Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, Jr., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE THIRD CIRCUIT

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPREME COURT OF THE UNITED STATES

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No.

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GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, Jr., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is a Petition for a Writ of Certiorari to review a Judgment of the Court of Appeals for the Third Circuit, sitting *en banc*, entered on July 8, 1974. The judgment reversed an order of the District Court for the District of New Jersey which had dismissed Petitioner's complaint and denied his application for a preliminary injunction. The judgment of the Court of Appeals, which was issued in lieu of a formal mandate, directed the District Court to immediately conduct an evidentiary hearing and set forth findings of fact and conclusions of law in the form of a declaratory judgment. The judgment from which *certiorari* is sought limited the evidentiary hearing on remand to whether the Petitioner had been coerced out of his Fifth Amendment rights before the State Grand Jury by virtue of the action of the State Supreme Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, sitting *en banc*, has not yet been reported and appears in the addendum in Petition for Writ of Certiorari, No. 74-80, which has been previously filed by the Respondents herein. This Petition also seeks review of the *en banc* opinion of the court below, albeit for different reasons. The prior opinion of a three-judge panel of the United States Court of Appeals for the Third Circuit, which had also reversed the order of the District Court and had remanded the matter for an evidentiary hearing, has been published. *Helfant v. Kugler*, 484 F.2d 1277 (3rd Cir. 1973). The testimony taken in the District Court on the return date of Petitioner's order to show cause, May 9, 1973, appears in the addendum herein (AH 1, *et seq.*)*

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* To clarify any references to petitions and addendums, the addendums herein will be cited AH for Addendum-Helfant. When referring to the addendum in Petition No. 74-80, reference will be to AK. All references to page numbers herein will read PH while references to pages in No. 74-80 will read PK.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. On August 6, 1973 the court granted Petitioner's motion for an accelerated hearing of the appeal. The hearing was held on September 7, 1973 and on that date the three-judge panel issued a preliminary injunction against the state-court trial, pending the issuance of a full mandate. On September 10, 1973 the court issued its opinion and order reversing the order of the district court. Based upon the State's representation that it would not move the state-court trial pending further proceedings, the Court of Appeals recalled its mandate to allow respondents herein to file a motion for rehearing *en banc*. On September 21, 1973 the Court of Appeals granted respondents' application for the rehearing *en banc*.

On July 8, 1974 the judgment in lieu of a formal mandate, reversing the order of the District Court and remanding the matter to the District Court for findings of fact and conclusions of law, was issued by the United States Court of Appeals for the Third Circuit, *en banc*. Respondents then moved to recall the mandate to allow for the filing of a petition for certiorari in this Court. The motion was granted on July 23, 1974 and the issuance of the mandate was stayed until August 7, 1974. The present petition followed.

QUESTIONS PRESENTED

1. Whether, on the basis of the record below and, given the interlocutory nature of the present Petition and Cross-Petition, the Petition of the State should be denied and the instant Cross-Petition granted?

2. Whether the "extraordinary circumstances" exception to the *Younger v. Harris* interdiction constitutes a distinct category suppporting federal intervention in a pending state criminal prosecution?

3. Whether the facts of this case present "extraordinary circumstances" under *Younger v. Harris*?

4. Whether the New Jersey Supreme Court in its interrogation of the Petitioner ten minutes before he was to appear to testify in the State Grand Jury, conducted with the aid of evidence supplied to the Court by the Deputy Attorney General conducting the Grand Jury proceedings, violated the doctrine of separation of powers provided for in both the Federal and New Jersey Constitutions and unconstitutionally deprived the Petitioner of his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

5. Whether the conduct of the New Jersey Supreme Court and the Deputy Attorney General, taken in view of the organization of the New Jersey Court system, inflicted and continues to inflict irreparable constitutional injury upon the Petitioner, justifying federal intervention?

6. Whether the Court below erred in finding that the present case was not one of bad faith and in limiting the fact-finding to the coercion issue only?

7. Whether the Court below erred in finding the present case inappropriate for injunctive relief?

8. Whether *Mitchum v. Foster*, 407 U.S. 225 (1972) presents an exception to the *Younger v. Harris* interdiction, allowing a relaxation of the *Younger* dictates in cases arising under §1983 of the Civil Rights Act?

COUNTER-STATEMENT OF THE CASE

This is a case *sui generis*. Research has failed to discover anything similar on its facts and perhaps, nothing comparable will ever again arise in this or any other court. This case is brought before this Court for the review of an order granted pursuant to *Rule* 12(b) (6) and thus every allegation of the verified petition originally filed by Petitioner Helfant must be taken as true. *Littleton v. Berbling*, 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.*, 445 F.2d 422 (3rd Cir. 1971). Furthermore, this case is brought before the Court on a very limited record, a point which must be stressed. The only testimony taken was that of the Petitioner and Patrick T. McGahn, Jr., one of his co-counsel. The testimony was taken on May 9, 1973 on the return day of Petitioner's order to show cause why a preliminary injunction against the state criminal prosecution should not issue. This testimony may be found in the addendum herein (AH, 1).

The procedural posture of this case and the dearth of the record below must be stressed because the petition in No. 74-80 is replete with factual statements that are *dehors* the record, evasions, conjecture and speculation. Petitioner is reluctant to say this, yet a simple comparison between the statement of facts in the Third Circuit *en banc* opinion and that contained in petition No. 74-80 illuminates the point. The differences, evasions, conjecture, speculation, misstatements of fact *dehors* the record and misstatements of existing facts, will be taken up below as part of the factual and legal exposition.

The material facts of this case are a matter of record, and may be found in the verified complaint and the testimony taken in the district court. Petitioner Helfant is a member of the New Jersey Bar and municipal court judge

currently on leave of absence from that position (AH, 20). In his verified complaint dated May 2, 1973 (AK 64, *et seq.*) Helfant alleged that some time before October 18, 1972 the State of New Jersey began a Grand Jury investigation. As part of its duties, the specially created State Grand Jury was directed to investigate, among other matters, an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and batttery in which the petitioner was alleged to have participated. The complaint had been filed in the Municipal Court of Egg Harbor, New Jersey. The State Grand Jury investigation in this matter was personally conducted by one of the defendants herein, Joseph A. Hayden, Jr., a Deputy Attorney General of the State of New Jersey.[1] It was alleged that Helfant represented one of the complainants who caused the complaint to be filed, that it was illegally and improperly dismissed with his help and that Helfant actually witnessed the withdrawal signature.

It was in connection with this matter and other matters that the Petitioner, pursuant to a subpoena, appeared before the New Jersey State Grand Jury on October 18, 1972. At this time, Helfant was advised that he was the target of the investigation. Upon learning of this, he refused even to go into the Grand Jury room. Accompanied by counsel, he was ordered to appear before the Assignment Judge of Mercer County, New Jersey, to determine whether, in fact, he should go into the Grand Jury room. The Assignment Judge directed Helfant to go into the Grand Jury room and, if Helfant so chose, to then rely upon his Fifth Amendment rights. The Petitioner on the same date unsuccessfully appealed to the Superior Court of New Jersey, Appellate Division, and

1. Mr. Hayden has subsequently left the Attorney General's Office and is currently engaged in private practice.

unsuccessfully attempted to appeal to the New Jersey Supreme Court. Unable to do this, he then appeared before the State Grand Jury, invoked his Fifth Amendment rights, and refused to answer any questions. Subsequently, while co-counsel Marvin D. Perskie was on vacation, a letter was directed to his partner by Patrick T. McGahn, Jr., co-counsel, which indicated that Helfant was again subpoenaed to appear before the State Grand Jury on November 8, 1972 and would likewise invoke his Fifth Amendment rights at that time (AH, 46).

On November 6, 1972 Helfant returned a telephone call that his office received from the Administrative Director of the New Jersey Courts. The Director informed Helfant that he was to appear before the New Jersey Supreme Court in private session on November 8, 1972 at ten minutes before ten o'clock in the morning. Helfant advised the Director that he had to be before the State Grand Jury at 10:00 A.M. The Administrative Director replied that he was well aware of that fact. He would not tell Helfant the reason for the meeting, though asked to do so.

On November 8, 1972 the Supreme Court sat in private session at its chambers at the New Jersey State House Annex in Trenton, New Jersey. At the other end of the hall was the meeting room for the State Grand Jury, which was then in session.

The Petitioner appeared at the appointed time on November 8th. He was preceded into the New Jersey Supreme Court chambers by Deputy Attorney General Hayden, who was carrying a file which now for the first time the State has revealed to be the raw grand jury minutes (PK, 13). Helfant entered the chambers and was confronted by the Court sitting in its robes. Various members of the Supreme Court began to question him.

The Chief Justice immediately inquired of the defendant whether he thought a judge should invoke the Fifth Amendment. Justice Sullivan asked what the defendant's feelings were about a judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before the Grand Jury. He also asked Helfant if he had sat as a judge since invoking the Fifth Amendment. The Chief Justice then resumed the questioning, asking Helfant questions about incidents that had been brought before the State Grand Jury and had not been made public. These incidents were contained in the Grand Jury minutes obtained and studied by the Supreme Court at its request. For example, did Helfant have knowledge of an ice machine that was alleged to have been illegally given to a New Jersey County Court Judge; what part had Abe Schusterman, a convict who testified against Helfant in the Grand Jury, in supplying certain liquor for the Bar Mitzvah of Helfant's son; what had been the seating arrangement at this Bar Mitzvah and who was present? The Chief Justice only cut off discussion about the merits of the criminal matter when Helfant tried to explain why he had previously resorted to the Fifth Amendment. The true coercive purpose of the Court was borne out by the very last question posed to Helfant by the Chief Justice: "What do you intend to do today?"

Samuel Moore, Helfant's co-defendant,[2] had also been called to the Supreme Court Chambers and, in fact, followed Helfant into the chambers. With him, he brought the original complaint which allegedly had been improperly dismissed. This is and was the central exhibit in the entire prosecution. There was affixed to the complaint a signed withdrawal allegedly witnessed by Helfant. Helfant's signature was at issue and had been the subject of ex-

2. Judge Moore has subsequently died. He was not a "critical witness" as the State has characterized (PK 62), but a co-defendant!

pert testimony before the State Grand Jury. The Chief Justice proceeded to discuss with Moore the validity of Helfant's signature with the complaint spread out before the Court. Furthermore, the Chief Justice asked Moore about the reliability of certain law firms in Atlantic City, New Jersey which were involved in the case. In short, the New Jersey Supreme Court was considering the main exhibit in a criminal case and investigating the validity of Helfant's signature allegedly thereon, *i.e.*, the minutes of the grand jury investigation. This completely belies the allegation of the State that the Court was merely attempting to determine whether the two judges intended to remain on the bench in their temporary positions.

Helfant then emerged from the chambers. His co-counsel, who testified before the Federal District Court, dramatically described Helfant's demeanor and appearance when he emerged. Helfant was very, very upset and appeared completely white and shaken. Counsel, as stated in the record, simply could not get through to him. Against the vigorous protests of both co-counsel, Helfant indicated he would testify because he was fearful that failure to do so would result in the loss of his license to practice and of his two judgeships. Obviously, the experience and encounter with the Supreme Court had had its intended effect. Helfant's will was broken, his resolve shattered. He was literally frightened beyond the reach of legal advice. His determination shaken, the entreaties of his lawyers to no avail, Helfant walked the very short distance between the Supreme Court chambers to the grand jury room down the hall, appeared before the State Grand Jury and testified.

Prior to Helfant's testimony, the State had called before the State Grand Jury and intended to recall as witnesses, three convicted criminals who were then in State prison: John Cantoni, Sheldon Kravitz and Abe Schuster-

man.[3] Helfant knew that they had testified against him. Thus, when he was called before the State Grand Jury he was in an inextricable position: once he testified, and if he agreed with their testimony, he implicated himself in an alleged criminal conspiracy; if he disagreed with them, he was subject to a charge of false swearing. This was the manner in which the Grand Jury was being conducted by Deputy Attorney General Hayden and this was the procedural framework facing Helfant when he testified on November 8, 1972. The result of Helfant's testimony was an indictment charging him with conspiracy to obstruct justice, obstruction of justice, compounding a felony and *four counts of false swearing.*

As a result of the actions of the New Jersey Supreme Court and Deputy Attorney General Hayden, on May 2, 1973 Helfant filed a verified complaint and order to show cause in the United States District Court for the District of New Jersey. The gist of his complaint may be summed up in Paragraph 14 thereof:

> "14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal

3. Each one of whom received promises of immunity for their appearances and other substantial concessions and promises of recommendations for doing so, which has been admitted by the State in discovery furnished in the State criminal proceedings. As a matter of fact, Kravitz and Schusterman are now at liberty as a result of the intercession of the Attorney General's Office. Kravitz has returned to the bar business, his disqualification to hold a liquor license removed.

> charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State Government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle co-operative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. *The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.S.C., §2283*" (AK, 70) (emphasis added).

The return date of the order to show cause was May 9, 1973. On that date testimony was taken of Helfant and Patrick T. McGahn, Jr., one of his co-counsel who was present on November 8, 1972. Some of that testimony has been cited in the Court of Appeals' *en banc* decision (AK, 10). In essence, Helfant testified consistently with the averments of his complaint and the overwhelming and devastating effect that the encounter with the Justices had upon him. Mr. McGahn testified that Helfant had intended to take the Fifth Amendment on November 8th prior to

entering the Supreme Court chambers and told how Helfant emerged shaken and distraught from the chambers and, against the advice of both counsel, and as a result of this encounter, informed counsel that he would testify.

In an oral opinion, the district court denied preliminary injunctive relief on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), precluded federal intervention. It also granted the State's motion and dismissed the complaint for failure to state a claim for which relief might be granted. As the *en banc* opinion recognized, the case came to it subsequent to a *Rule* 12(b)(6) motion (AK, 11). As it further recognized, although an evidentiary hearing on the injunction request had been conducted and the court had made limited findings on this issue,

> " . . . it did not find facts with respect to the merits of Helfant's §1983 claim. Thus, there have been no fact findings on the crucial issue of whether Helfant's testimony before the grand jury was the product of his free and unconstrained will" (AK, 11-12).

Thus, as the Court of Appeals recognized and as must be stressed herein, there was only a limited record made below. Only Petitioner introduced testimony, and this testimony was wholly corroborative of his complaint. The State did not introduce any testimony and did not in any way seek to refute the material allegations of the complaint. To this date, under the facade of a flurry of legal maneuvers, it has continued to avoid an examination of the facts within its control. Therefore, as the *en banc* decision below recognized "we must take as true Helfant's allegations. . . ." (AK, 12).

The case was in this procedural posture when it was brought before the three-judge panel on September 7, 1973. In an order dated September 10, 1973 and in an

opinion, the three-judge panel reversed the order of the district court. Its holding first recognized that there was a distinct and separate category of "extraordinary circumstances" under *Younger* and that the present fact situation came within that special category (AK, 55). It said:

> "Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category, it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced from him by the Supreme Court of New Jersey, his Fifth Amendment privilege against self-incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey and ultimately in that Court, hardly seems adequate" (AK, 55-56).

Subsequent to this opinion, the State petitioned for a rehearing *en banc*. In an order dated October 31, 1973 the petition for rehearing before a three-judge panel was granted and the court ordered supplemental briefing on the coercion issue (AK, 39-40). Subsequent to the filing of the supplemental briefs, the court, in an order dated January 11, 1974, relisted the case for a rehearing before the Court of Appeals, *en banc* (AK, 38). On April 10, 1974 the appeal was argued (AK, 5). The opinion of that court was filed July 8, 1974. The opinion also reversed the order of the District Court and reinstated the complaint. Considerably narrowing the scope of the relief sought, however, the court remanded the case to the United States District Court for a proceeding, "limited to a determination of whether Helfant's testimony before the State

Grand Jury on November 8, 1972 was a product of a free and unconstrained will." It ordered that the district court "issue a declaratory judgment setting forth this conclusion" (AK, 23).

The *en banc* opinion also recognized that there was a separate and distinct category of "extraordinary circumstances" under *Younger v. Harris, supra*, (AK, 12). It found that a predicate of *Younger* was an assumption that the defense of the pending state prosecution would afford an adequate remedy at law for vindication of any federal constitutional rights at issue. The court thus predicated "extraordinary cicumstances" to an "inability of the state forum to afford an adequate remedy at law" (AK, 12-13).

The certified judgment in lieu of mandate embodying the decision of July 8, 1974 was filed by the court on that date (AK, 3). The State then again petitioned the court to recall its judgment in lieu of formal mandate and to clarify its opinion regarding the four counts of false swearing contained in the State's indictment. In an order dated July 23, 1974 the Court of Appeals recalled its certified judgment in lieu of mandate and stayed the issuance thereof until August 7, 1974. The other relief requested was denied.

In conclusion, this case thus comes before this Court after two hearings in the United States Court of Appeals for the Third Circuit and after two opinions entered in that court in favor of Petitioner. Furthermore, this case comes before the Court subsequent to the granting of a *Rule* 12(b) (6) motion and upon a limited record consisting of testimony totally favorable to the contentions of the Petitioner. Under these circumstances, it is respectfully submitted, and will be shown below, that there is an insufficient record to support the granting of the writ in

No. 74-80. It is further submitted that given the procedural posture of this case, in which all of Helfant's allegations must be considered as true, there is a sufficient record to allow this Court to deal with the contentions of the Petition herein. It is respectfully submitted that only the present Petition be granted so that the significant issues raised herein may be reviewed by this Court and that there might be a full evidentiary hearing to include the determination whether there was bad faith, whether the case falls within the "extraordinary circumstances" category of *Younger v. Harris, supra*, and whether, assuming Helfant's contentions to be true, this would be a proper case for a federal injunction.

REASONS FOR GRANTING THE WRIT

Introduction

This case brings before the Court a factual complex that is probably *sui generis*. Alleged in the complaint are allegations that the highest Court of the State of New Jersey collaborated with a Deputy Attorney General conducting an ongoing State Grand Jury investigation to coerce the Petitioner, Helfant, into foregoing his Fifth Amendment rights and in pursuance of this end, demanded, received and improperly considered Grand Jury minutes and exhibits of an investigation which had not concluded.

It is further alleged that the same Deputy Attorney General divulged raw grand jury data to the court in violation of and in contradiction to the sacred doctrine of separation of powers, *N.J. Const.* Art. III, §1 (1947) and that this was prosecutorial misconduct. Lastly, Petitioner alleges violations of his Fourteenth Amendment procedural due process rights and Sixth Amendment right to a fair trial and counsel arising out of the unlawful procedure utilized by the New Jersey Supreme Court to "investigate" (PK, 27) alleged judicial misconduct by Helfant. In essence, the factual complex literally presents a "breakdown of the State judicial system. . . ." *Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2210 (1974) (Burger, Ch. J concurring) and that the complaint charges that Helfant, as an individual, is being "deprived of meaningful access to the State Courts. . . ." *Id.* Also implicated is the right of an individual to be tried in a State court system without even the hint of impartiality. Thus, some of the basic tenets of our democracy are being brought into question.

Indeed, this case brings an extraordinary factual situation before this Court. As was said in the opinion of the three-judge panel which initially heard the appeal below:

> "If the circumstances here alleged do not fall within that category [of extraordinary circumstances] it it would be difficult to imagine any that would" (AK, 55).

What is involved here is the illegitimate abuse of State power and a resort to our federal court system to alleviate the abuse. For the federal courts to abstain in this situation would be that "blind deference to 'States' Rights'" which even the *Younger* opinion found impermissible. *Younger v. Harris, supra,* 401 U.S. at 44. This is a situation in which the appearance of impartiality, the appearance of justice, mandates federal court interference with the state court's procedure. If the present case does not represent "extraordinary circumstances" under *Younger* then, it is submitted, no case ever will, and that language which has been construed by later cases as creating a separate category allowing intervention will henceforth be of no further legal effect. It is doubtful whether this Court would indeed want that construction placed upon *Younger.*

The "extraordinary circumstances" doctrine

At the outset, the procedural posture of the present appeal should be emphasized. First, in reviewing the dismissal of the complaint in the district court, the reviewing court must liberally construe the complaint and consider all of the allegations to be true. *See Rule* 12(b)(6), *Federal Rules of Civil Procedure.* All doubts are to be resolved in plaintiff's favor. *Littleton v. Berbling,* 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.,* 445 F.2d 322 (3rd Cir. 1971). As this Court has stated, the standard should be whether the action is so patently

without merit to justify dismissal of the complaint. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Thus, the allegations of the complaint are entirely true for the purpose of this Petition. Furthermore, it should again be noted that the only testimony taken on the return date of the order to show cause on May 9, 1973 was that elicited on behalf of plaintiff and that this testimony currently remains uncontradicted.[4]

There can be no doubt that a Federal Court does have jurisdiction to grant an injunction, 42 U.S.C. §1983, to redress the deprivation of "any rights, privileges or immunities secured by the constitution. . . ." *See* 28 U.S.C. §1343 (3). And this Court has held that this action may be by means of an injunction, *Mitchum v. Foster*, 407 U.S. 225

4. This is a crucial fact which cannot be overstressed in this Petition. Petition No. 74-80 is replete with evasions, conjecture, speculation and many statements of fact which are not in the record below. First, there is nothing in the record which discloses that Helfant's appearance before the Grand Jury "received some public notoriety and was disclosed in several newspapers in the state" (PK, 13). Furthermore, there is nothing in the record indicating that the Administrative Director of the New Jersey Courts in accordance with "settled practice" informed the Supreme Court of this (*Id.*). Neither is there anything indicating that the Administrative Director was instructed to obtain a report from the Attorney General handling the matter and all relevant Grand Jury testimony. (*Id.*) There is also nothing in the record below indicating that the New Jersey Supreme Court had directed the Administrative Director to ask both Helfant and Moore to meet with it in a private conference room on that date. There is nothing in the record indicating what the purpose of this meeting was to be (*Id.*). Nor was there anything in the record which indicates that the New Jersey Supreme Court is duty bound to inquire into allegations of judicial misconduct and that these investigations do not generally await the conclusion of pending or related criminal charges. Nor does anything in the record indicate that the New Jersey Supreme Court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a criminal case (PK, 27 and n.10 thereunder). These misstatements cannot be over-emphasized. It is indeed sad that the State has seen fit to so distort the actual record in this case and bring so many innuendoes and actual misstatements before this Court. Helfant takes no issue with the power of the Supreme Court of New Jersey to supervise the Judges and administer the Court system of the State nor with its power to discipline members of the bench and bar. However, a hearing on judicial impropriety without notice, without counsel, without a fair hearing, held ten minutes before a Grand Jury proceeding, finds no support in Court Rules, State Statutes, Constitutional law or, for that matter, in anything in the American system of jurisprudence.

(1972) or by declaratory judgment, *Steffel v. Thompson*, – U.S. –, 94 S. Ct. 1209 (1974).

When a suit seeks to enjoin a pending state criminal prosecution the dictates of *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases must of necessity come into play. In *Younger*, Justice Black re-emphasized the principles that should govern a federal court when it is asked to intervene in state criminal proceedings.

First, he said that a court of equity should not act to restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief, 401 U.S. at 43-44. Secondly, he stressed, as a valid consideration, the notion of comity, *i.e.*, a proper respect for state functions. As was said, however, adherence to notions of comity does not mean:

> " . . . blind deference to 'States' rights' any more than it means centralization of control over every important issue in our National Government and its courts. • • • What the concept does represent is a system in which . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States" 401 U.S. at 44.

Thirdly, the opinion stressed the need for a showing of irreparable injury both great and immediate. The opinion said that the cost, anxiety and inconvenience of defending against a single criminal prosecution, "could not by themselves be considered 'irreparable' in the special legal sense of that term" 401 U.S. at 46. *See, Leslie v. Matzkin*, 450 F.2d 310, 312 (2d Cir. 1971). (There were no special circumstances in the case that could justify the granting of an injunction). Thus, the opinion recognized that

without the showing of something more, the threat to a plaintiff's federally protected rights had to be one that could not be eliminated by his defense against a single criminal prosecution. As indicated by Justice Stewart in his concurring opinion, if there had been "official lawlessness" the requirement of irreparable injury could be satisfied. 401 U.S. at 56 (Stewart, J. concurring).

Lastly, as Justice Black pointed out, the dictates of the *Younger* opinion were by no means a complete limitation upon the situations in which a federal court could intervene in state criminal proceedings. As he wrote, "other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." 401 U.S. at 54. In the companion case of *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) this thought was reiterated:

> "Only in cases of proven harassment with prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

That there is a separate "extraordinary circumstances" exception to *Younger's* interdiction has been recognized by statements in later cases in this Court. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 230 (1972); *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498, 510 (1972). In *Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2209 (1974) (Burger, Ch. J. concurring) it was said:

> "The injury must include, except in extremely rare cases, the usual prerequisites of bad faith and harassment."

Moreover, lower federal court cases also have recognized that the "extraordinary circumstances" exception constitutes a distinct category. *See, e.g., Lewis v. Kugler,* 446 F.2d 1343 (3rd Cir. 1971); *Shaw v. Garrison,* 467 F.2d 113 (5th Cir. 1972). As was said in *Hobbs v. Thompson,* 448 F.2d 456, 465 (5th Cir. 1971):

> "The opinion [in *Younger v. Harris*] does not purport to extend beyond this traditional realm of comity and require across-the-board abdication of federal decision-making power in all manner of cases."

These cases demonstrate that an "extraordinary circumstances" exception does exist as a separate and distinct category supporting federal intervention. This being shown, the next question now becomes whether the facts in this case, coming before this Court after a *Rule* 12(b)(6) order, fit within this category. It is respectfully submitted that they are of the most "extraordinary" character.

The application of the "extraordinary circumstances" exception to the facts of the present case

As was recognized by the majority opinion below (AK, 13, *et seq.*), the New Jersey Supreme Court is not only the highest court in the State, but "is charged with responsibility for the overall performance of the judicial branch." *In re Mattera,* 34 N.J. 259, 168 A.2d 38, 45 (1961). The Court has the power to make rules governing the lower New Jersey courts and to enforce them. *Id.* In fact, the New Jersey Constitution,[5] statutory law,[6] and rules of court[7] confer the broadest administrative power on the Court over the bench and bar.

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5. *N.J. Const.* Art. VI, §2, ¶s 1-3 (1947).

6. *N.J.S.A.* 2A:1B-2 through 9.

7. *N.J. Court Rules,* 1:20-1 *et seq.*

> "The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. *Lichter v. County of Monmouth,* 114 N.J. Super. 343, 349, 276 A.2d 382, 385-86 (1971)."

The New Jersey Constitution provides that the Chief Justice of the Supreme Court is the "administrative head of all the courts in the State" Art. VI, §7, ¶1. This imbues the Chief Justice with the power to:

> " . . . assign Judges of the Superior Court to the Divisions and parts of the Superior Court, and . . . from time to time transfer Judges from one assignment to another. . . . " N.J. Const. Art. VI, §7, ¶2.

It is clear that the New Jersey Supreme Court is much more than an appellate court. It is the overseer of the bench and bar in the State and is vested with formidable supervisory and administrative power over both.

Distinct statutory procedures and rules govern the exercise by the Court of its power to remove judges or discipline members of the bar. Under *N.J.S.A.* 2A:1B-3, a proceeding for the removal of a judge may be instituted by either house of the Legislature, the Governor, by the filing of a complaint, or "by the Supreme Court on its own motion." Full due process rights and protections are afforded a judge during these proceedings. *See, N.J.S.A.* 2A:1B-3 through 10. And, the judge may be removed only if the Supreme Court "finds beyond a reasonable doubt that there is cause for removal. . . . *N.J.S.A.* 2A:1B-9.

Similar protections are afforded the lawyer facing disciplinary proceedings. *N.J. Rules of Court,* 1:20-1 *et seq.* If a disciplinary committee receives a complaint, or is directed by the Supreme Court to investigate a member of the bar,[8] it prepares a statement of charges.[9] A complaint

is then issued and served[10] and a preliminary investigation made.[11] The committee then either dismisses the complaint or, if it finds unethical or unprofessional conduct, prepares a presentment which it files with the Supreme Court.[12] That Court then determines if it shall issue an order to show cause why the attorney should not be "disbarred or otherwise disciplined."[13] A hearing is held in the Supreme Court itself on the order. It is important to note that all records, files and meetings are confidential, *Rule* 1:20-3(b), and all briefs, papers and exhibits submitted to the Supreme Court are impounded by the Clerk. *Rule* 1:20-8. In these disciplinary proceedings, as in the removal proceedings, full due process rights are afforded.[14]

An examination of the record indicates that Petitioner was never afforded any of these protective procedures. He was ordered by the Administrative Director of the New Jersey courts to appear in chambers *ten minutes* before a Grand Jury appearance. He was not told any reason for the meeting. The Deputy Attorney General conducting the Grand Jury investigation preceded him, carrying a file. Once inside, he was questioned by the Chief Justice and another Justice about his intention regarding the Fifth Amendment. The Chief Justice questioned him about an ice machine and about the Bar Mitzvah of Helfant's son (AH, 26), matters which were currently under investigation! The Court was preoccupied about Helfant's intentions about testifying before the Grand Jury.

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8. *Rule* 1:20-4(b).
9. *Id.*
10. *Rule* 1:20-4(b).
11. *Rule* 1:20-4(c).
12. *Rule* 1:20-4(h).
13. *Rule* 1:20-4(i); *Rule* 1:20-8.
14. The protections afforded by the rules were recognized in *DeVita v. Sills*, 422 F.2d 1172 (3rd Cir. 1970) and thus the Court of Appeals for the Third Circuit upheld them.

Moreover, Helfant's co-defendant, Samuel Moore, was also called before the Supreme Court immediately after Helfant. He brought with him the complaint which constituted the State's primary exhibit. The Chief Justice discussed the complaint and Helfant's signature and further discussed matters that were being presented before the Grand Jury. Thus, the allegations by the State that the merits of the underlying controversy were not discussed is simply not true. The record does not support these allegations, but directly contradicts them.[15]

On the basis of the record below, it is thus evident that Helfant is being subjected to a State prosecution tainted by collusion between the executive branch, through Deputy Attorney General Hayden, and the judicial branch, through the highest court of the State. This collusion, as alleged in the complaint, not only worked to coerce Helfant into foregoing his Fifth Amendment rights, but also worked to deprive him of procedural due process and of his Sixth Amendment right to counsel and fair trial (as will be shown below). Helfant has alleged that this illegal participation by the Supreme Court has tainted the entire State proceeding. Nothing in the record shows the contrary, notwithstanding the State's unsupported allegations that there is no reason to assume that the "entire State judicial system is morally and ethically bankrupt" (PK, 33). What is crucial to the present determination is the realization that the record below supports only Petitioner's case.

Moreover, based on that record, can it be said that "extraordinary circumstances" do not here exist? As the *en banc* decision recognized, the *allegation* has been made of a tainted prosecution (AK, 15). The New Jersey

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15. See (PK, 14-15). Also, Moore, the *co-defendant*, executed an affidavit to this effect on September 21, 1972 which is part of the record (AH, 47).

court structure, in imbuing the Chief Justice and Supreme Court with tremendous power over the bench and bar, at least facially supports the allegation of the possibility that the "brooding omnipresence" of the New Jersey Supreme Court could affect a trial judge seeking to make a determination of the voluntariness issue (AK, 21).[16] On the basis of this record, it is respectfully submitted that it cannot be said that the opinion below erred in its determination that "extraordinary circumstances" exist.

Furthermore, if Helfant lost the voluntariness issue in the trial court, his ultimate appeal would necessarily have to be to the very court alleged to have been collusively engaged in the coercion! As both the *en banc* decision (AK, 12) and the decision of the three-judge panel recognized (AK, 55), the predicate of *Younger v. Harris* is an assumption that the defense of the pending state prosecution would afford an adequate remedy at law for the vindication of the federal constitutional rights at issue. As they further recognized, exceptional circumstances "must include circumstances reflecting upon the likelihood that the State forum will afford an adequate remedy at law. . . ." (AK, 55; *see* AK, 12-13). As was said in *Fenner v. Boykin*, 271 U.S. 240, 244 (1926):

> "The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that [this] course would not afford *full* protection"[17] (emphasis added).

Obviously, any resort to the New Jersey court system, as a matter of law, would not afford "full protection" and

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16. As the opinion recognized, this factual determination would have to be made by a State Judge, "subject to the 'absolute and unqualified' administrative power of the Supreme Court. . . ." (AK, 16).

17. The New Jersey courts have rejected all of Petitioner's efforts to quash the indictment on the ground that they were based on coerced testimony (AK, 13).

thus "if the circumstances here alleged do not fall within that category [of extraordinary circumstances] it would be difficult to imagine any that would." (AK, 55, opinion of three-judge panel).

Based upon the present record there are ample facts to justify, at the least, federal intervention for the purpose of federal fact-finding herein. *See, Conover v. Montemuro,* 477 F.2d 1073 (3rd Cir. 1973).

The irreparable injury requirement

It has been shown above that the allegations of the complaint and the limited record more than support a finding that "extraordinary circumstances" exist to warrant federal intervention herein. As in every case in which an injunction is sought, "irreparable injury" must be shown. *Perez v. Ledesma, supra,* 401 U.S. at 85. As will be shown below, Petitioner has suffered and continues to suffer unconstitutional injury which is truly irreparable.

As was shown above, distinct statutory procedures and rules exist which govern the Supreme Court in the exercise of its power to remove judges and discipline members of the bar. These procedures protect the individual and insure procedural regularity and due process of law. *See, De Vita v. Sills,* 422 F.2d 1172 (3rd Cir. 1970). Yet, the record indicates that even if the New Jersey Supreme Court was contemplating legitimate disciplinary proceedings, it completely neglected to abide by its own procedures. *Cf. City of Lawrence v. Civil Aeronautics Bd.,* 343 F.2d 583 (1st Cir. 1965). Consequently, the complaint legitimately raises a procedural due process claim. The magnitude of the deprivation of procedural due process is probably best articulated by Mr. Justice Jackson in his dissenting opinion in *Shaughnessy v. United States,* 346 U.S. 206, 224 (1953) (Jackson, J., dissenting):

> "Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. • • • Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

The failure of the New Jersey Supreme Court to abide by the applicable statutes and rules thus has raised Helfant's Fifth Amendment claim in a due process sense. *See, United States v. Raines*, 362 U.S. 17 (1960); *Buchalter v. New York*, 319 U.S. 427 (1943). The State argues that the procedure utilized by the Court here was "recognized and established through State constitutional and statutory law" (PK, 40) and that the Supreme Court's obligation to the bench, bar and public sometimes forces the Supreme Court to act prior to formal indictment (PK, 33). The simple answer, of course, is that there is nothing in the record to support this bald assertion; in fact, this is the first time this has been raised as a justification! Moreover, even if this were the actual situation, there is nothing in the statutes or rules which allows the Court to summarily interrogate a judge or lawyer prior to the institution of formal proceedings (and especially ten minutes before a scheduled grand jury appearance). In essence, there is not one word of testimony to support the State's assertion that the Supreme Court was engaged in any legitimate inquiry.[18] The facts in the record simply belie it.

Moreover, the failure of the New Jersey Supreme Court to abide by established law and its own rules also

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18. As will be discussed below, the facts if anything, indicate a bad faith attempt at coercion.

deprived Petitioner of his right to counsel, mandated by both the *New Jersey Court Rules*, 1:20-1 *et seq.* and the Sixth Amendment. U.S. Const. Amend. 6. *Cf. Coleman v. Alabama*, 399 U.S. 1 (1970); *Conley v. Dauer*, 463 F.2d 63 (3rd Cir. 1972); *See also, Johnson v. Avery*, 393 U.S. 483, 490 n. 14 (1969); *Spevak v. Klein*, 385 U.S. 11 (1967).

Once it is understood that the inquiry was indeed constitutionally illegitimate, the proper legal framework of the coercion issue takes shape. While there can be no doubt that *lawful* investigatory conduct may possess a "compelling atmosphere"[19] or create a "Hobson's choice"[20] for an individual, unlawful or illegitimate conduct renders the product of that conduct illegal, incompetent and inadmissible. *Cf., Miranda v. Arizona*, 384 U.S. 436, 466 (1966). It is the *procedure* causing the compulsion which must be examined to determine the legal consequences of the official action. In other words, if a defendant signed a sworn confession exacted from him in violation of *Miranda*, there could be no question that he could not be prosecuted for perjury, should the confession prove false. *Cf. Williams v. Florida*, 399 U.S. 78 (1970).

This argument gains more force when the rationale behind the Fifth Amendment is examined. It is clear today that the purpose of the Fifth Amendment is to deter illegal governmental action. *See, e.g., Michigan v. Tucker*, — U.S. —, 94 S. Ct. 2537 (1974); *Jackson v. Denno*, 378 U.S. 368 (1969); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Culombe v. Connecticut*, 367 U.S. 568 (1961). *Cf. Garrity v. New Jersey*, 385 U.S. 493 (1967). The product of that conduct may indeed have great relevance

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19. *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).
20. *Id.*

to crucial issues of guilt or innocence. But this is not the focus of the inquiry; the focus is upon the governmental action. Here the Supreme Court illegally interrogated Helfant, summoning him to its chambers when it had absolutely no right to do so, ten minutes before a grand jury appearance of which it knew. Anything exacted from him as a result of this confrontation is illegal. With this analysis in mind, there can be no doubt that Helfant has suffered and continues to suffer irreparable constitutional harm which is both great and immediate.

Moreover, the magnitude of the due process violation increases if one examines the entire factual pattern alleged in the complaint. Prior to Helfant's testimony three convicted felons, John Cantoni, Shelly Kravitz and Abe Schusterman, testified in the grand jury under a grant of immunity. They were all summoned there by Deputy Attorney General Hayden and testified pursuant to promises of concessions and recommendations of leniency by the State (which fact has been admitted by the State. See note 3 herein). Thus, the testimony before the grand jury had been structured, or in other words, "set up" prior to November 8, 1972. Previously, Helfant had resorted to the Fifth Amendment and had every intention to do so on this date. Moreover, this fact must have been known to the Supreme Court because the State has now admitted for the first time that the grand jury minutes were turned over to the Court prior to Helfant's entrance into chambers on November 8th. Similarly, the Court must have also known of the testimony of Cantoni, Kravitz and Schusterman. When he was called into chambers, Helfant was immediately confronted with questions about his resort to the Fifth Amendment and was asked upon leaving by the Chief Justice, "What do you intend to do *today*?" Helfant,

fearful and overwrought, conceiving that his livelihood was at stake, testified before a grand jury that had been structured to indict him for some offense if he testified.

As alleged, the facts of Helfant's complaint bring it squarely within the four corners of *United States v. Mandujano,* 496 F.2d 1050 (5th Cir. 1974) a case remarkably similar on its facts and directly on point in its holding (which is reprinted in full in the addendum herein (AH, 51).

In that case, the defendant appeared before a Grand Jury investigating alleged narcotics violations in the district. The United States Attorney had received a report from a narcotics agent that he had previously attempted to offer defendant money for the purchase of heroin. The United States Attorney had questioned the agent of the circumstances of this attempted buy in preparation for Mandujano's appearance before the grand jury. When Mandujano appeared to testify the agent had preceded him detailing the circumstances of the attempted buy. The government attorney questioned Mandujano, tracking the exact facts of the actual contact between the federal narcotics agent and Mandujano. The defendant was subsequently indicated for perjury. The perjury was based upon Mandujano's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The defendant then moved to suppress his testimony before the grand jury. The district court granted the motion expressing itself in words quite appropriate to the present case:

> "Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment. • • • If the de-

> fendants admitted that they had offer [*sic*] to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. • • • The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. *Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them*" (emphasis added). *United States v. Mandujano*, 365 F. Supp. 155, 158-59 (W.D. Tex. 1973).

The United States Court of Appeals for the Fifth Circuit affirmed. It first recognized that there was no basis for the perjury indictment prior to Mandujano's testimony. If the government attorney actually anticipated any answers, the court found, he must have known that the responses would require defendant to either confess to a crime or commit perjury. (Slip opinion at 5255). The inference was that the questioning was primarily aimed at baiting defendant to commit perjury. Thus, the only "safe harbor" for the defendant was to keep silent, a right of which the government failed to inform him. Although the court recognized that *Glickstein v. United States*, 222 U.S. 139 (1952) and other cases held that the Fifth Amendment does not allow a person to commit perjury, it distinguished the case on several important factors. First, *Glickstein* involved no governmental misconduct. As the Court said, "we simply cannot ignore the unfairness in baiting this defendant before the grand jury. . . ." (Slip opinion at 5259). Thus, as a deterrent to any future prosecutorial misconduct the court ordered suppression of the testimony. *(Id.)*

More importantly, the court held that the:

> " . . . entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the *pale of permissible prosecutorial conduct*. We conclude that the entire proceeding was a violation of Mandujano's due process rights. (Slip opinion at 5262-63, emphasis in original.)

As the court concluded, an asserted denial of due process is tested by the totality of the facts of the given case. Here the conduct was so "offensive to the common and fundamental ideas of fairness" as to amount to a violation of due process (slip opinion at 5263). It thus affirmed.

The present case involving Helfant is far stronger. The testimony against Helfant did not come from a federal narcotics agent, but from three convicts then in jail who were granted immunity for their testimony and promises of recommendations of leniency (which have been carried out). Secondly, the misconduct was not limited, as it was in the *Mandujano* case, to a prosecutor calling in a prospective defendant knowing that he had been involved in wrongdoing and would not be in a position to admit it before a Grand Jury. In the present case it was a combined action of prosecutorial misconduct and *judicial lawlessness* which coerced and frightened the petitioner out of the exercise of his Fifth Amendment rights. As in the *Mandujano* case, the proceedings smacked of an attempt to entrap the defendant to either incriminate himself or commit perjury. The proceeding in *Mandujano* was found to be violative of due process. Certainly, nothing could be more shocking to common notions of fairness than judicial-executive collusion. There can be no doubt that Petitioner has suffered, and continues to suffer, a massive violation of his due process rights. Thus, the State cannot legally or analytically distinguish, under *Mandujano*, the false swearing counts of the State indictment.

The present case is also on all fours with those of a recent New Jersey case, *State v. Redlinger*, 64 N.J. 41 (1973). Here, Redinger's co-defendant had been charged in municipal court with careless driving. On the return day of the summons, Redinger appeared for his co-defendant and testified that he had been driving the offending vehicle. Consequently, the ticket was dismissed and a ticket for careless driving was issued against Redinger. Subsequently, but prior to the return date of Redinger's ticket, the police obtained sworn statements from two individuals who had seen Redinger's co-defendant driving the car during the offense. When Redinger appeared in court, he pleaded guilty to the offense; the Judge stated, however, that he wanted the story under oath. Accordingly, Redinger was sworn and testified that he drove the car at the time of the offense. It was not disclosed to Redinger at the time that the Court had two contrary sworn statements. He was subsequently charged with perjury and moved to dismiss the indictments. On appeal, the court held that "fundamental fairness" barred the State from charging him with perjury. As the court said,

> " . . . the State should have no part in any kind of trickery. What happened at the hearing . . . smacks of entrapment. • • • This was not fair play" 64 N.J. at 50.

Similarly, the collusion of the Supreme Court and the Deputy Attorney General "smacks of entrapment." Helfant was set up and then coerced into testifying. On the basis of *United States v. Mandujano* and *State v. Redinger*, Helfant suffered and continues to suffer constitutional harm in the due process sense.

Most important, this case comes to this court not after a conviction for false swearing, but only after in-

dictment. No one has proved Helfant lied, and, in fact, the inference can be just as strong that the three convicts lied. There was certainly a motivation to do so. An indictment is only an accusation and is not reflective of guilt or innocence. This procedural aspect and the denial of due process sets apart those cases cited by the State for the proposition that the Fifth Amendment does not protect against perjury. *E.g., Bryson v. United States,* 396 U.S. 64 (1969); *United States v. Knox,* 396 U.S. 77 (1969); *United States v. Kahringer,* 345 U.S. 22 (1952). In each of the cases cited by the State, the defendant had been convicted beyond a reasonable doubt for perjury and sought to overturn the conviction on the ground that the government had illegally exacted the criminal statement. Moreover, in each case, at the time the perjury was committed, the government had a lawful right to exact the information it sought. It was neither engaging in unlawful activity nor prosecutorial misconduct. In the present case both were present.

More on point are those decisions such as *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968) and *Haynes v. United States,* 390 U.S. 85 (1968). In these cases, the method by which defendants were caused to incriminate themselves was legally challenged. Here Helfant also seeks to lawfully challenge the method by which the statements were exacted, *prior* to any determination of guilt.

Also involved in the factual complex is the divulgence of raw grand jury data by Deputy Attorney General Hayden. This was in direct violation of the New Jersey Court Rules mandating secrecy for grand jury proceedings[21] and of numerous cases. *See, e.g., State v. Clement,*

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21. *Rules* 3:6-7, 3:6-8.

40 N.J. 139 (1963); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959); *United States v. McKeaver,* 271 F.2d 669 (2nd Cir. 1959). *Annot.* "Inspection—Grand Jury Minutes" 3 A.L.R. Fed. 29 (1970). While a grand jury is an arm of the court, *In re Jeck,* 26 N.J. Super. 514, 98 A.2d 319 (App. Div. 1953), it is not a tool of either prosecutor or judge. No rule or statute provides for the divulgence of raw grand jury data to the Supreme Court during an on-going investigation, and it may not be used by the court for any purpose. *Compare, Branzburg v. Hayes,* 408 U.S. 664 (1972); *United States v. Bryan,* 339 U.S. 323 (1950); *Blackmer v. United States,* 284 U.S. 421 (1932) (a grand jury itself may not violate a defendant's constitutional rights). To say the Court had control over the Grand Jury and thus had a right to inspect its uncompleted deliberations is like saying a judge may take money *in custodia legis* and go on a vacation with it.

The action of the Deputy Attorney General was plainly misconduct. In New Jersey misconduct by the prosecutor in the grand jury or by the grand jury itself is grounds for dismissal of the indictment. *State v. Grundy,* 136 N.J.L. 96 (Sup. Ct. 1947); *State v. Garrison,* 130 N.J.L. 350 (Sup. Ct. 1943); *State v. Borg,* 9 N.J. Misc. 59, 152 A. 788 (Sup. Ct. 1931); *State v. Donovan,* 129 N.J.L. 470 (1943); *State v. Dayton,* 23 N.J.L. 49 (Sup. Ct. 1850). The attorney general, upon being requested to divulge the grand jury minutes, should have immediately refused. His failure to do so was misconduct.

The deputy's divulgence also violated the sacred doctrine of separation of powers embodied in the Federal and New Jersey Constitution, N.J. Const. Art. III, §1

(1947). This divulgence also serves to illuminate the magnitude of constitutional harm which is alleged in the complaint.

An examination of the complaint reveals much more than an allegation of coercion. It alleges due process violations and a violation of Petitioner's Sixth Amendment right. Moreover, it alleges constitutional harm that has already taken place, not something that is merely threatened. Petitioner has not only attacked the coerced testimony, but alleges that an entire tainted prosecution should be enjoined.[22] He seeks vindication of his civil rights through the only medium that will not only vindicate those rights but also deter future illegal conduct.

It must be emphasized that this is a civil rights case brought under 42 U.S.C. §1983. Under this section it is not necessary to show an improper motive on the part of the person charged, *Bennett v. Gravelle*, 320 F. Supp. 203 (D. Md. 1971). Neither is it necessary that the wrongful acts complained of were done with a specific intent to deprive a person of a federally protected right,

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22. Thus, the State's argument that the coercion issue is not justiciable is invalid. This argument assumes future facts; its invalidity lies in its failure to grasp that the constitutional harm has already taken place, which is the taint upon the entire judicial process caused by the collusion of the respondents. The test for justiciabiliy is whether "there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality. . . . " *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Under this formula there can be no doubt that there is a justiciable controversy before this Court. Moreover, abstention is a "judge-made doctrine" *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972) which does not mean "the abdication of federal jurisdiction, but only the postponement of its exercise." *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964). It is usually invoked to allow a state court to pass on an issue of state law. *American Trial Lawyers Ass'n., New Jersey Branch v. New Jersey Supreme Court*, 409 U.S. 467 (1973).

Obviously, the coercion issue is one of federal law properly before this Court. More importantly, the other constitutional claims are of more than sufficient moment to allow jurisdiction of the federal courts. Actually, the real and only question before the Court is whether the district court was in error in dismissing the complaint for failure to state a cause of action.

Baxter v. Birkins, 314 F. Supp. 222 (D. Colo. 1970); nor is it necessary to allege a specific intent in the complaint, *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Ca. 1970). Consequently, even if "no malevolent purpose can be imputed" (PK, 39) to the actions of respondents, such a finding would be irrelevant to the question of the validity of the civil rights complaint.

To truly decide the issues before this Court it is imperative that the totality of the complaint be examined. Once it is realized that this is not just a Fifth Amendment case, the magnitude of the allegations becomes crystal clear. Viewed in this light, the harm is at once seen both "irreparable" and "great and immediate."

The bad faith requirement

It has never been conceded, nor is it now conceded, that bad faith was never present in Helfant's prosecution.[23] In fact, bad faith has been alleged from the beginning by the Petitioner. As Paragraph 14 of the verified complaint states, in part:

> "The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.S.C.A. §2283" (AK, 71).

It is respectfully submitted that bad faith is present and that the court below erred in foreclosing any fact-finding on this issue.

"Bad faith" is generally signified as a prosecution brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. *See, Perez v.*

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23. The State's statement is wrong (See PK, 29) as is that in the dissenting opinion below (AK, 24).

Ledesma, 401 U.S. 82, 85 (1971). *Younger* and its companion cases did not create new law, but merely clarified existing law. The opinions make it clear that they were not charting a new path, but adhering to an existing path and disapproving a tendency to stray wrought by *Dombrowski v. Pfister*, 380 U.S. 479 (1965). As the opinions themselves indicated, however, they were by no means the last word on the types of situations that might justify federal intervention. "Other unusual situations calling for federal intervention may also arise, but there is no point in our attempting now to specify what they might be." 401 U.S. at 54. That they were not the last word on what constitutes "bad faith" has been recognized by a number of lower federal courts.

In *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972) the Court enjoined a single state prosecution holding that an injunction may lie against state officials if they either fostered or took part in any alleged misconduct. Significantly, the court equated bad faith with misconduct in a *single* prosecution, saying:

> "When the federal right sought to be protected is the right not to be subjected to a bad faith prosecution or a prosecution brought for purposes of harassment, the right cannot be vindicated by undergoing the prosecution" 467 F.2d at 122, n. 11.

What *Shaw v. Garrison* demonstrates is that an injunction may lie against state officials if these officials either fostered or took part in any alleged misconduct. If bad faith is proven, the individual could not vindicate his rights by a defense to the prosecution even if it was a single state prosecution.

This principle has been impliedly accepted in the Third Circuit in the case of *Lewis v. Kugler*, 446 F.2d

1343 (3rd Cir. 1971). Here, plaintiffs sought in part to enjoin the alleged arbitrary and unreasonable searches of their vehicles by the New Jersey State Police while on New Jersey highways. The Court of Appeals for the Third Circuit affirmed the dismissal of the complaint by the district court as to the pending state criminal prosecutions. The court found that plaintiffs had failed to establish that they were being prosecuted under circumstances establishing the kind of irreparable injury above and beyond that associated with the defense of a single prosecution. The court went on to make the following observation, however:

> "The plaintiffs allege police misconduct, but an injunction against pending state criminal proceedings would operate against the prosecutorial authorities, and there was no allegation that they have either fostered or taken part in any alleged misconduct" 446 F.2d at 1348.

The opinion thus impliedly recognized that an injunction could lie if the prosecutorial authorities did engage in tainted activities. *Cf. Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971).

In *United States ex rel Birnbaum v. Dolan*, 452 F.2d 1078 (3rd Cir. 1971) it was indicated that a federal suitor could allege bad faith in the *manner* of the prosecution, rather than in the *reasons* for it.

Because there was collusion between the executive and judicial branches; because there was a divulgence of raw grand jury data to the Supreme Court; because the grand jury had been structured by Deputy Attorney General Hayden and the testimony of convicts to indict Helfant; because the Supreme Court knew of this and also knew of Helfant's earlier resort to the Fifth Amendment;

because Helfant was called into chambers, without knowing the reason, ten minutes before a grand jury appearance; because the Supreme Court did discuss the merits of the case with co-defendant Moore; because the court questioned Helfant about his intentions to testify on November 8th, and because the Chief Justice asked as a final question, "What do you intend to do today?" the Petitioner charges that this was a prosecution brought in bad faith. The situation simply reeks of it.

The court below chose to find no bad faith. Petitioner respectfully submits that this was error. He also submits that it was error for the court to limit his relief only to a declaratory judgment. He submits that the court erred in thus restricting the scope of the fact-finding hearing. He therefore petitions this Court to review this finding and ultimately remand for a full hearing on this as well as the other important issues alleged and to reopen the possibility for the issuance of an injunction.

The interlocutory status of the present case

As has been stated numerous times above, this case comes before this Court after a *Rule* 12(b)(6) motion and upon a very, very limited record. It is axiomatic that this Court will not review a non-final judgment. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1969). Of course, if there is a significant issue of law involved, the Court *may* grant *certiorari*. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1948), if the case is presented on a proper record. Here the State in Petition No. 74-80 seeks review after a remand order by the Court of Appeals for the purpose of making a proper record. As such, their petition falls directly within the holding of *Brotherhood of Locomotive Firemen & Enginemen v. Bangor and Aroostook R.R.*, wherein it was said:

> "Petitioners seek *certiorari* to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for writ of certiorari is denied" 389 U.S. at 328.

Under this case, the limited record and the remand renders the issues raised in No. 74-80 unripe for review. In fact, the tactical purpose of the State has been to avoid a complete record, a course of conduct in which it persists. It knows it would not withstand the healthy process of the cross-examination of the parties involved.

Conversely, Petitioner herein submits that the present petition should be granted to allow review of the opinion of the Third Circuit. He submits for the following reasons:

First, a first impression case is being brought before this Court on a record wholly favorable to Petitioner's allegations. There is enough in the record to demonstrate that the Third Circuit Court of Appeals erred in restricting the scope of relief available to Petitioner to a declaratory judgment and narrowing the scope of the fact-finding hearing to the coercion issue only. The question here should be: does the complaint allege a factual situation which might justify relief by way of an injunction?

Secondly, if this case does present "extraordinary circumstances" shouldn't the scope of the hearing encompass all of these circumstances, including possible bad faith?

Lastly, the remand of the Court of Appeals was generally favorable. Consequently, there would be no disruption of the fact-finding if its scope were widened.

Given these factors, the present Petition, unlike No. 74-80, does bring concrete and justiciable issues before this Court. Consequently, the Petition in No. 74-80 should be denied and the present Petition granted.

The effect of *Mitchum v. Foster*, 407 U.S. 225 (1972) upon *Younger v. Harris*, 401 U.S. 37 (1971)

The respondents, in their petition, argue that the "extraordinary circumstances" exception to the *Younger v. Harris* interdiction does not constitute a distinct category supporting federal intervention in a pending State criminal prosecution, in the absence of a showing of "harassment" or "bad faith."

It is most important to remember, first, that the Petitioner herein alleged "bad faith" in his verified complaint, continued to do so through each of the subsequent proceedings, and does so allege in this Petition. Therefore, the statement made in the Petition of the State that: "It is conceded that neither bad faith nor harassment were present in Helfant's prosecution" (PK, 29) is wrong. That sentence was lifted *in toto* from the dissent of Judge Adams (AK, 24). Therefore that Judge and the other two Judges who subscribed to his dissent were also factually incorrect. Any legal opinion to which they subscribed based on this interpretation of this fact must be equally incorrect.

But even assuming, *arguendo*, that no "bad faith" existed in the State prosecution, there need be no showing of either bad faith or harassment in order to allow federal intervention under the Civil Rights Act. The *Younger v. Harris* interdiction came about as the result of a suit under the Civil Rights Act, 42 U.S.C.A. §1983. The later case of *Mitchum v. Foster*, 407 U.S. 225 (1972) was also based on that Act. In *Mitchum*, a prosecuting

attorney sought to close down Mitchum's book store as a public nuisance under Florida law. Relying on 42 U.S.C.A. §1983, Mitchum filed suit in the United States District Court, alleging not that a State law was unconstitutional, but rather that the State laws were being unconstitutionally applied.[24] This Court in a unanimous decision, spoke through Mr. Justice Stewart to the issue of the denial by the District Court of an injunction under 42 U.S.C.A. §1983. It held that the injunctive relief sought was improperly denied by the lower court and, more specifically, that §1983 is an "expressly authorized exception to 28 U.S.C.A. §2283, the Anti-Injunction Statute." 407 U.S. at 242-243.

Mr. Justice Stewart reviewed *Younger v. Harris*, 401 U.S. 37 (1971), its companions and its progeny[25] and discussed the history of the Act which §1983 succeeded in 1948.[26] He concluded that the previous Act was intended to enforce the provisions of the Fourteenth Amendment "against State action . . . whether that action be executive, legislative, or *judicial*," (citing *Ex parte Virginia*, 100 U.S. 339 and supplying his own emphasis). 407 U.S. at 240. And, after reviewing the legislative history of the 1871 Act, Justice Stewart concluded:

> "Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. The debate was not about whether the predecessor of §1983 extended to actions of state courts, but whether this innovation was necessary or

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24. Of course, *Younger v. Harris*, 401 U.S. 37 (1971) conceived the unconstitutionality of a state law, *per se*.

25. These cases included at that time: *Samuels v. Mackell*, 401 U.S. 66; *Boyle v. Landry*, 401 U.S. 77; *Perez v. Ledesma*, 401 U.S. 82; *Dyson v. Stein*, 401 U.S. 200; *Byrne v. Karalexis*, 401 U.S. 216.

26. §1 of the Civil Rights Act of 1871. 17 *Stat.* 13.

> desirable . . . This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; *and it believed that these failings extended to the state courts*" 407 U.S. at 241-42 (emphasis added).

In his dissent below in the Court of Appeals, Judge Adams relied very heavily on his analysis of the term "Our Federalism." He took issue with his brethren in the majority in their interpretation of *Younger v. Harris.* Finding that the majority's exposition of the *Younger* rule was fair, he nevertheless found that the majority holding was not in the "spirit" of *Younger* (AK, 24).

It is respectfully submitted that *Mitchum v. Foster* is at variance with Judge Adams's interpretation of the spirit of *Younger,* and that *Mitchum* truly demonstrates the "spirit" of *Younger.*

Mr. Justice Stetwart's opinion in *Mitchum* very specifically limits that case to the question of the exception of 42 U.S.C.A. §1983 to 28 U.S.C.A. §2283. Yet that opinion is replete with both an analysis of the legislation preceding §1983, the cases concerning that legislation, and with an analysis of the cases concerning §1983 itself, including *Younger* and its companions.[27] From that analysis, Mr. Justice Stewart found that the predecessors to §1983 were adopted by a Congress which "clearly conceived that it was altering the relationships between the States and the Nation with respect to the protection of federally created rights," and he imputed that intent to the Congress which adopted the legislation known as the Civil Rights Act, which included 42 U.S.C.A. §1983.

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27. See note 25 *supra.*

Thus, where there is a clear denial of the protection of a constitutional right of an individual by the actions of a State, "Our Federalism" must defer to the individual's right to have his constitutional rights protected.

Therefore, *Mitchum v. Foster* clearly allows an exception to the *Younger v. Harris* interdiction, and allows a relaxation of the *Younger* dictates in cases arising under §1983 of the Civil Rights Act.[28]

Concluding statement

As Justice Black recognizes in *Younger v. Harris,* comity is a concept embodying a respect by the federal government for the "legitimate" activities of the State. 401 U.S. at 44. Comity recognizes the need for the national government to protect federal rights. It is not "blind deference to 'States' Rights,'" he writes, but rather a signal to the federal government that its efforts to protect these rights must always be done in ways that will not "unduly interfere" with legitimate state functions.

A state, of course, has a legitimate interest in administering its criminal justice system. Any undue interference with its legitimate administration would tear at the very roots of "Our Federalism." (See PK, 19). When a State, particularly the State Supreme Court, engages in illegitimate activities resulting in the violation of federal rights, comity does not stand in the way of federal protection by the federal government of federal constitutional rights. *Cf. Dombrowski v. Pfister,* 380 U.S. 481 (1965). For, in this situation, the individual is being beseiged by those very State authorities to whom he would first turn for protection; finding them involved in the oppression, he can only turn to the federal government. In this situation, it could

28. 42 U.S.C.A. §1983.

not be said that the national government is "unduly" interfering with any legitimate state activity. Indeed, federal abstention would be that "blind deference" even Justice Black found impermissible.

The situation herein represents an illegitimate exercise of State power. This is not a case where there was a "good faith" attempt to enforce what might be an invalid statute, as was the situation in *Younger* and its companion cases. A *de facto* conspiracy is being alleged between separate branches of government directed toward the subversion of an individual's constitutional rights. Surely, tension could arise by federal interference of state officials in their good faith attempts at enforcement of their criminal law. If the situation warrants, no tension can arise if a federal court steps in to protect the individual, right the wrong and stop illegal state conduct by State officials.

Here, the allegation has been made that the highest court of the State of New Jersey was engaged in an effort to violate the civil and constitutional rights of Petitioner. Here, it is alleged that there was a wholesale failure by the State judiciary and the executive to abide by notions of due process and other constitutional strictures. And here, these allegations have remained unrefuted; in fact, they have now, for the first time, been admitted in a transparent attempt to ameliorate their severity. Under these conditions does the intervention of the federal court detract from the integrity of the State process? Or rather, does it reestablish respect for proper state functions?

The court below concluded that federal intervention herein would serve to strengthen notions of comity and respect (AK, 19). Under the unusual factual complex presented could it be said that this conclusion was wrong? As the court below recognized: "Judges in a free society

regard even the appearance of a biased decision as more harmful than a result they personally disapprove" (AK, 20).[29] This thought has been expressed in our cases, and has become a concommitant of due process.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' *In re Murchison*, 349 U.S. 133, 136 (1955).

See also, United States v. Raines, 362 U.S. 17 (1960); *Tumey v. Ohio*, 273 U.S. 510 (1927). *James v. New Jersey*, 56 N.J. Super. 213 (App. Div. 1959) (where a municipal magistrate had an opinion of the guilt of defendant in a drunken-driving case because he had seen defendant at police headquarters shortly after the arrest, the magistrate should have immediately disqualified himself. His failure to do so was a violation of due process). By removing the factual determination on the coercion issue from the state-court system, the federal court is negating *any* appearance of possible non-objectivity. In so doing, it will restore to Petitioner his "adequate remedy at law" not presently available. In this respect the opinion of the Court of Appeals is wholly correct.

Petitioner differs, however, with the court below in its conclusion that a declaratory judgment limited to the coercion issue is an adequate remedy. The type of conduct ascribed to respondents in the complaint should *never* occur. *Cf. United States v. Mandujano, supra.* Such governmental overbearance has no place in a free society. To insure against any hint of recurrence, the

29. The court quoted Lord Herschell's remark to Sir George Jessel: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it" (AK, 20).

product of this overbearance must be suppressed by the most effective deterrent available: *Injunction.* Only by an injunction may the State authorities be put on notice that activities of this kind will never be tolerated and that prosecutions, once tainted, cannot continue on their repressive paths.

Petitioner deserves this full vindication. The impact of the State prosecution upon his life has been devastating. The scurrilous remark in the State's Petition, which is completely *dehors* the record, that repondent "is seen in his old haunts undeterred and unaffected by the grand jury finding of probable cause" (PK, 63) is, and there can be no easier word for it, a lie. It would be inappropriate in this brief to cite illustrations not supported by the record, but it may simply be stated that Petitioner's professional and personal life have been wrecked by the indictment.

The delay cited by the State (PK, 62) has not been caused by the Petitioner. Rather, it was the State that petitioned for a recall of the original mandate of the three-judge panel; it was the State that petitioned for a rehearing *en banc;* it was the State the flooded the court with briefs each time a case was decided that might have been peripherally relevant to the present one; it was the State that petitioned for a recall of the mandate of the *en banc* decision; and it is the State which has initially petitioned this Court for review. In short, the State has done all it can to delay and prevent the public airing of the allegations of the complaint. It has been the State that has used every conceivable procedural device to avoid facing the critical issues. Only now, in its petition has it sought to justify its actions, and this through unscrupulous innuendo and misstatement of fact. It does not deserve to have its petition granted.

CONCLUSION

For all the above reasons, Petitioner prays that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted and that the Petition in No. 74-80 be denied.

Respectfully submitted,

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On the Petition

ADDENDUM "A"

UNITED STATES DISTRICT COURT

District of New Jersey

No. 607-73

Testimony of:
Patrick T. McGahn Jr., and Edwin H. Helfant
Before: Hon. John J. Kitchen, U.S.D.J.
Dated May 9, 1973, Camden, New Jersey

(2) THE COURT: Gentlemen, this is a return day for a motion in the matter of Edwin H. Helfant versus Kugler and others. Gentlemen, what is your intention as far as procedure is concerned? I have read your briefs. I read your affidavits. I don't need those repeated. I will be glad to hear anything in addition to that, that you would care to present; but don't repeat those, please. Who is going to speak for the plaintiff?

MR. PERSKIE: I am Marvin D. Perskie of the firm of Perskie and Callinan, 3311 New Jersey Avenue, Wildwood, New Jersey, will speak for the plaintiff.

THE COURT: All right. You may proceed.

MR. PERSKIE: I am also assisted by co-counsel, Patrick T. McGahn of Atlantic City, who is co-counsel, who is present at counsel table.

THE COURT: You may proceed, Mr. Perskie.

MR. PERSKIE: If the Court please, we are prepared to introduce oral testimony if the Court will entertain it at this time. I have spoken to the Attorney General and he apparently is not prepared to proceed with (3) oral testimony.

THE COURT: All right. You may proceed with whatever you have.

MR. PERSKIE: I would also like the right to reserve argument to respond to the brief of the Deputy Attorney General which I received at 3:15 yesterday, was delivered to me personally in Wildwood.

THE COURT: Mine was received about the same time.

MR. PERSKIE: Mr. McGahn.

PATRICK T. McGAHN, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. PERSKIE:

Q Mr. McGahn, you are a licensed member of the Bar of the State of New Jersey; is that correct?

A Yes, sir.

Q How long have you been a practicing attorney?

A Since 1959.

Q And do you hold any other officer positions in the State of New Jersey?

A Yes, sir. I am District Supervisor for the New Jersey Transfer Inheritance Tax for the County of Atlantic, a position which I held for 16 years.

(4) Q Directing your attention to October 18, 1972, did you at that time represent one Edwin H. Helfant, the plaintiff in this matter?

A Yes, sir.

Q And on October the 18th, 1972, where did your representation take you at that time; where were you?

A Took me to the State House Annex in Trenton, New Jersey in response to a subpoena that was issued to Mr. Helfant to appear before the Statewide Grand Jury.

Q Did you appear with him at that time?

A Yes, sir. I appeared at the State House Annex in Trenton on that date at approximately 9:45 A.M. on the Fourth Floor of that Building.

Q Who was conducting the Grand Jury proceeding to your knowledge at that time?

A The Attorney General's Office.

Q What particular Deputy?

A Joseph Hayden.

Q Do you know Mr. Hayden?

A Yes, sir, I do.

Q And to your knowledge was he conducting the Grand Jury proceedings that were going on?

A Yes, sir, he and other members of the Attorney General's Staff.

Q Now did Mr. Helfant in response to that subpoena (5) voluntarily enter the Grand Jury Room?

A No, sir, he did not.

Q What transpired when you were at that hearing?

A Upon arriving in the morning I informed Mr. Hayden that Mr. Helfant would invoke his Fifth Amendment rights and that he would not testify. I went one step further. I advised Mr. Helfant not to even go into the Grand Jury Room. Conversation continued over that. During the course of the day Mr. Hayden called many other witnesses and at approximately 3:45, he asked me

again whether or not Mr. Helfant would go into the Grand Jury Room. I told him we would invoke the Fifth and that I would not even let Mr. Helfant walk into the Grand Jury Room to invoke the Fifth because I felt under the Sarcone Case, he didn't even have to show himself—viewing himself in front of the witnesses might even prejudice himself as to the Fifth Amendment.

Q Now, was there a Court hearing that transpired over this situation?

A As a result of that, Mr. Hayden, I believe, called Judge Kingfield and set up a hearing at approximately five minutes after four over in the Courthouse in Trenton.

Q Now to conserve time, Mr. McGahn, you have read the complaint in this matter and the attachments thereto, have you not?

A Yes, sir.

(6) Q And attached to the complaint is a transcription of the proceedings before Judge Kingfield?

A Yes, sir.

Q Is that a true and accurate and complete transcription of what went on before Judge Kingfield on that date?

A Yes, sir, it is.

Q Now after the hearing before Judge Kingfield—

A I might add one other thing, Mr. Perskie. Prior to the hearing both Mr. Hayden and I went into Judge Kingfield's Chambers at which time both of us presented our sides of the matter and I asked Judge Kingfield at that time for a delay of the matter so that I could further review the matter as to whether or not the Fifth Amendment went so far as to not have a witness even go into the Grand Jury Room. He said that since we couldn't

agree, Mr. Hayden and I, that we would then go out into open Court and put it all on the record.

Q Now after the hearing terminated, what action did you take next?

A I went back, it was approximately five minutes of five on that date; I went back to the State House Annex and I asked Mr. Hayden if he would accompany me to, I believe, the Supreme Court, Office of the Supreme Court —yes, in fact, it was the Supreme Court. I attempted to call Judge Leonard of the Appellate Division, who is in our area in Atlantic County. I couldn't locate him. I looked at the Lawyers (7) Diary and found that Judge Matthews was the closest one to South Jersey. So, I caught Judge Matthews before he left his Chambers. Mr. Hayden and I both presented our arguments to Judge Matthews over the telephone at which time I requested a stay and it was denied by Judge Matthews. I then attempted to reach Justice Weintraub to no avail and then Mr. Helfant had no alternative at that time but to go in before the Grand Jury and invoke his Fifth Amendment rights. Now Mr. Hayden, prior to Mr. Helfant going in, said that he would ask him certain specific questions and he outlined what those questions were, and Judge Helfant indicated he would take the Fifth Amendment to each of the questions. Judge Helfant then proceeded from the Supreme Court Chambers to around the corner and down the hall to where the Grand Jury was waiting and at approximately 5:15 or 5:30, he went into the Grand Jury Room and emerged about five to ten minutes later.

Q Now was there any conversation that took place in your presence either with you and Mr. Hayden or with Mr. Hayden and Mr. Helfant when you were present after this session with the Grand Jury terminated?

A I am sure there were conversations Mr. Perskie, but I don't know, I can't remember what they were.

Q Now do you know whether or not Mr. Helfant was subsequently subpoenaed to reappear before the Grand Jury?

A Yes, sir, he was.

(8) Q Do you know about when the subpoena was received and for what date it was received?

A I believe that he received the subpoena on the 27th or 28th of October, 1972.

Q Did you personally see the subpoena?

A Yes, sir, I did. Mr. Helfant called me when he received the subpoena and indicated to me that it was served by a Detective Sullivan and I told him at that time that I would call Trenton and attempt to get a rush job on the transcript before Judge Kingfield so that we would have that available when we would go to Trenton again.

MR. PERSKIE: Could I have this marked?

THE COURT: Marked for identification.

(Subpoena was marked P-1 for identification.)

BY MR. PERSKIE:

Q Mr. McGahn, I show you P-1 for identification and ask you if you can identify that document, sir?

A Yes, sir. This is the subpoena that was a copy of which was given to me by Mr. Helfant either on the 28th or 29th of October, I don't recall.

MR. PERSKIE: I offer this for the purpose of hearing if your Honor please.

THE COURT: Any objection, Mr. Laird? There is no dispute that he got the subpoena, (9) is there?

MR. PERSKIE: No, I don't think so.

MR. LAIRD: No.

MR. PERSKIE: I am trying to bring things in that haven't come before you.

(The exhibit just referred to was received and marked P-1 in evidence.)

MR. PERSKIE: With your Honor's permission, may I have this letter marked?

(Letter was received and marked P-2 for identification.)

BY MR. PERSKIE:

Q Mr. McGahn, I show you P-2 for identification and ask if you can recognize and identify that document?

A Yes, sir. This is a letter written by me on October 31, 1972, directed to John F. Callinan, Esquire.

Q Who is John F. Callinan?

A Partner of the firm of Perskie and Callinan of Wildwood, New Jersey.

Q Why was that document sent to him rather than myself?

A Mr. Perskie, if you recall, you were down in Puerto Rico on a short vacation.

Q All right. Now, did you write that letter after consultation with the defendant?

A Yes, I did.

(10) Q And—

A Only that, but after consultation with Mr. Helfant I called Trenton in an attempt to speed up the transcript which I had ordered of the 18th and that explained, I think, the lag of two days between writing the letter to Mr. Callinan and the receipt of the transcript.

Q Now did Mr. Helfant agree on the course of conduct you outlined in that letter?

A Well, yes, Mr. Perskie, he did.

MR. PERSKIE: I'd like to offer this if your Honor please.

MR. LAIRD: May I see it, please.

MR. PERSKIE: This has been previously attached to exhibits that have been filed in this matter.

MR. LAIRD: Yes.

THE COURT: May be marked.

(The letter was received and marked P-2 in evidence.)

BY MR. PERSKIE:

Q Now Mr. McGahn, was there a subsequent appearance of Mr. Helfant before the State Grand Jury after this letter?

A Yes, sir.

Q Do you remember when that took place?

A Yes, sir, it was the 8th of November, 1972.

(11) Q And did you accompany Mr. Helfant to Trenton on that date?

A Yes, Mr. Perskie. In fact, you were with me, along with Mr. Helfant.

Q And do you know from your direct communication with Mr. Helfant what his intention was at that time before he arrived at Trenton with regard to testifying?

A Yes, sir. He was going to take the Fifth Amendment.

MR. LAIRD: May I just have a clarification on that question with regard to testifying as to what?

Q As to anything?

A Yes, sir.

MR. LAIRD: His intention to take the Fifth to anything?

THE WITNESS: Yes, that was what he conveyed to me.

Q Mr. McGahn, what time did you arrive at Trenton on November the 8th?

A We arrived there about 9:20 Mr. Perskie.

Q And what floor was it?

A It was on the fourth floor of the State House Annex.

THE COURT: Aren't we getting too detailed, Mr. Perskie? I know where the Supreme Court is. Can we just get to whatever the meat of the (12) testimony is? Mr. McGahn is testifying to all these details and I don't think they are disputed, are they Mr. Laird?

MR. LAIRD: No, your Honor.

MR. PERSKIE: I want to have a record. I don't want to burden or press the Court.

THE COURT: All right.

BY MR. PERSKIE:

Q Now Mr. McGahn, who did you see in official position when you got to the fourth floor of the Annex?

MR. LAIRD: What does he mean "official position"?

THE COURT: I don't know.

Q I don't mean the janitor. Did you see an Attorney General or did you see—

THE COURT: Wasn't there—and I guess you will get to this—wasn't there a phone call from the Administrative Director?

MR. PERSKIE: I will get to that through the one who directly received it.

Q All right, I will lead you a little. Did you see Deputy Attorney General Hayden?

A I don't believe I saw him immediately upon arriving, but sometime between oh, quarter of nine and 10:30 I did.

Q And was he conducting a session of the Grand Jury on (13) that date?

A There was a Grand Jury sitting, whether or not he was conducting it at that time, I don't know.

Q Now do you know where Mr. Helfant went after he got to the State House?

A Yes, sir, I do. He went to the Clerk of the Supreme Court.

Q And where did he go after that?

A I believe he waited for a few minutes in the Clerk's Office while she made a telephone call and then he proceeded down the hall and into the Chambers of the Su-

preme Court. It is a room that is exactly opposite to where the Grand Jury was sitting at the other end of the hall, at approximately ten minutes of ten.

Q How long was he in that room to your recollection?

A I would say no longer than fifteen minutes.

Q Did you see anybody else go into that room either before or after Mr. Helfant went in?

A Shortly thereafter, Mr. Hayden went into the Supreme Court Chambers.

Q Did you have a conversation with Mr. Helfant when he came out of the Supreme Court Chambers?

A Yes, sir, I did.

Q What was his appearance at that time?

A Well, he was very, very upset. He appeared completely (14) white and he said, I am going to testify.

Q And what did you say to him?

A I said, Eddy, you are crazy. I said, as far as I am concerned, the case against you is very weak and if you go in and testify, they will indict you for perjury or false swearing. I said, your testimony is going to be against three cons and I said, I feel very, very strongly about this; and I said, that as you know, that I have urged you from the very beginning not to testify. Mr. Perskie, I didn't get through to Mr. Helfant.

Q What did he respond if you recall? What did he say?

A He said, it is my ticket, it is my ticket. You are not losing your ticket; and referring to that he meant the right to practice.

Q And did I talk to him too?

A Yes, you did.

Q In the same vein?

A Yes, sir; in fact, even in stronger terms.

Q Now after that conversation where did Mr. Helfant go?

A Mr. Helfant remained, I would say, outside the Grand Jury Room for at least, oh a half hour or so or maybe longer waiting to go in to testify.

Q And did he go in and testify?

A Yes, he did.

Q Did you ever have any conversation with Hayden or did (15) anyone have any conversation in your presence with Hayden that Helfant was going to testify voluntarily on any matter before that Grand Jury before he went into the Supreme Court Chambers?

A No. The only conversation that I can recall that I had with Mr. Hayden was the fact that Mr. Hayden was very careful. He came out and said that Mr. Helfant would testify about three matters and he said that he would give him his Fifth Amendment rights after it—prior to each of the matters. One, I believe, was an ice box, an ice machine, another was a watch and the third one was the Cantoni matter; but he said—Hayden was very specific, and he said, that Helfant could come out and would come out after each item and he was going to handle each item separately.

MR. PERSKIE: I have nothing further, Mr. McGahn. If you want to cross examine.

CROSS EXAMINATION
BY MR. LAIRD:

Q Just a couple questions, Mr. McGahn. You first began to represent Mr. Helfant in this matter about when?

A I would say somewheres, oh, around the 11th or 12th of October.

Q That was after—

A He had been served with the first subpoena, I believe.

Q And he responded to that subpoena on October 18?

(16) A Yes, sir.

Q Now the second subpoena you said he called or you called him—

A No, he called me.

Q Did he indicate what the subpoena was for?

A Testify before the Grand Jury, that was all.

Q Not about any particular matter?

A He mentioned something about Detective Sullivan said something that he was going to grant him immunity or something to that. I don't recall the full conversation on that, Mr. Laird.

Q Now when he arrived, this is for the second time to testify on November 8?

A Yes, sir.

Q When he went into the Grand Jury the first time, what did he testify about?

When he went into the Grand Jury to testify for the first time on that morning?

A Are you talking about the 8th or 18th?

Q The 8th, the second time he appeared?

A Well, it was either the ice machine or the watch, because Mr. Hayden was very clear and he came out and he was, I thought, went overboard so to speak, to inform me that he would separate each of the items and allow Mr. Helfant to come out, that they would separate investigations sort of.

(17) Q Now that matter which is the subject matter of the indictment that's involved here, when did he testify about that incident?

A I know that was the last thing he testified about.

Q And that was approximately how long after he had begun to testify before the Grand Jury?

A I don't know; it might have been just before noon or might have been in the afternoon, I just don't recall that; because there were many other witnesses and I recall and I think, there was another hijacking case or heavy equipment case or something. You were running witnesses.

Q Did he indicate to you that he wished to take the Fifth Amendment as to the stolen watch investigation?

MR. PERSKIE: At what time?

Q At any time?

A I don't recall; I really don't.

Q Did he indicate to you that he wanted to take the Fifth Amendment with respect to the ice machine investigation?

A I don't recall, but I believe that it was his intention to take it to everything but I can't absolutely say concerning those two items, but I definitely know—

MR. LAIRD: Thank you Mr. McGahn, you have answered the question.

THE WITNESS: I'd like to finish.

THE COURT: No, you answered the question.

(18) REDIRECT EXAMINATION
BY MR. PERSKIE:

Q Did you have any other conversation or communication with regard to the defendant with regard to his Fifth Amendment before the appearance before the Supreme Court?

A No, other than—

MR. LAIRD: With respect to what?

MR. PERSKIE: That's what we'd like to know.

Q Did he have any conversation—

MR. LAIRD: With respect to any particular investigation?

Q With regard to any matter being investigated by the State Grand Jury?

A Yes, sir. He said, that I believe, it was Justice Weintraub or Justice Sullivan asked him about the ice machine that was allegedly given to Judge Rauffenbart and also his seating arrangements at his Bar Mitzvah concerning his children.

Q His son's Bar Mitzvah?

A His son's Bar Mitzvah, and that one of the reasons that I was concerned further about cautioning him on the Fifth Amendment especially on the 18th, was the fact that I saw two of the cons there, Kravitz and Schusterman, and there was a third man there that was subsequently identified as (19) Cantoni. I didn't know Cantoni. I wouldn't know him. I was involved in a case with him

but we plead out and I don't recall I ever met Mr. Cantoni.

MR. PERSKIE: That's all I have.

THE COURT: Anything further?

MR. LAIRD: Just to indicate my objection about what is hearsay and to take that into consideration.

THE COURT: Thank you.

MR. PERSKIE: I'd like to call Mr. Helfant now if the Court please.

EDWIN H. HELFANT, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. PERSKIE:

Q Mr. Helfant, where do you reside, sir?

A 15 MacArthur Boulevard, Somers Point, New Jersey.

Q And you are a licensed member of the Bar of the State of New Jersey?

A I am, sir.

Q And you are presently a Municipal Court Judge?

A I am a Municipal Court Judge in two municipalities, but I have taken a voluntary leave of absence from both judgeships.

Q Mr. Helfant, when was the first time you appeared (20) before a State Grand Jury in connection with the matters that we are concerned with today?

A On October the 18th, nineteen hundred and seventy-two.

Q And by what means were you summoned before that Grand Jury?

A I was issued a subpoena by Detective Sullivan.

Q Did you have any conversation with Detective Sullivan or the Attorney General Hayden with regard to your willingness to appear and testify before appearing before the Grand Jury on October the 18th?

A No, sir.

Q Now you heard the testimony of Mr. McGahn with regard to the matter that transpired before the Grand Jury on October the 18th and before Judge Kingfield; are they correct to your knowledge?

A Yes, sir.

Q Did you indicate to anybody on that date that you would appear voluntarily before the State Grand Jury and testify to anything?

A No, sir.

Q Mr. Helfant, when did you receive any notices or subpoenaes from the State of New Jersey in connection with this matter?

A There was another Grand Jury session on October the 25th where Judge Moore and this Abe Schusterman testified; (21) and on the 27th Detective Sullivan appeared at my office in Atlantic City and handed me the subpoena. I said to Detective Sullivan, I have already invoked the Fifth Amendment. What's this about? He said that the State was thinking about giving me immunity but that he wanted to make me a State's witness. I informed him, State's witness to what? And he said, when you get up there they will tell you.

Q Did you tell him at that time that you would voluntarily appear and testify as to anything?

A There were no—

Q Including ice boxes, Bar Mitzvahs, watches?

A There was no discussion whatsoever with Mr. Sullivan other than what are they going to give me immunity for and when you get up there they are going to tell you.

Q Mr. Helfant, directing your attention to November the 6th, were you in your office on that date?

A No, sir.

Q Did you have communication with your office on that date?

A Yes.

Q As a result of your communication with your office on November the 6th, 1972, what did you learn about this case, if anything?

A I had learned the Administrative Director's Office called my office and left a phone number at approximately 3:35 P.M. (22) from the Sheraton Post Motor Inn in Cherry Hill or I think it is Cherry Hill—I put in a call to Mr. McConnell.

Q Did you speak to him directly?

A I spoke to Mr. McConnell.

Q And what was the conversation?

A Mr. McConnell told me the Supreme Court wanted to see me at 9:50 A.M. on Wednesday the eighth, which was two days later, the day in between being Election Day. I said to Mr. McConnell that I have a Grand Jury subpoena for 10:00 A.M. on November the 8th. He said, the Court—he didn't say he was—he said the Court is aware of that and they want you at 9:50 in the Clerk's Office. I said, can you tell me what it is in reference to? And he said, the Supreme Court wants to talk to you.

Q Now you went to Trenton on November the 8th in the company of your two attorneys?

A Both you and Mr. McGahn.

Q What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton?

A Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

(23) Q When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not?

A Yes.

Q And you were subsequently ushered into the Supreme Court private Chambers?

A Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Pesco took me from her office to the Supreme Court Chambers or conference room, not the Chambers.

Q Conference Room. Do you know how many Judges were there?

A To my knowledge one judge, I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q Were they sitting in their robes?

A Yes, sir, I think they were; yes, sir.

Q Now what happened when you came in?

A I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q Now were they sitting down, the Judges?

A Yes, they were seated.

Q Were you standing or—

A Mr. Perskie, I don't remember if they told me to be (24) seated or if I was standing up.

Q And what was your state of mind and your feelings as you entered those Chambers?

A Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can?

A The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q Was there any other conversation?

A Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself

had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q What did you respond?

(25) A I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q Now was there any file in the presence of the Chief Justice?

A There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely (26) recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q How long would you say you were totally, the total time you were before the Court?

A It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q And when you came out—

A Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q And what did you tell him?

A I said, Mr. Chief Justice, I am going to testify.

Q And why did you make that decision?

A Well Mr. Perskie, the complete aura of the room and the way the questions were posed to me and the manner in which the Chief Justice posed his question to me, frankly, I was scared.

Q Scared of what?

A I didn't know what they were going to do to me because I had known the nature of the witnesses that had testified before this Grand Jury. I had seen the Chief Justice posing questions to me about what the Grand Jury later asked me about. I didn't know whether they were going to take my license away to practice law or suspend me pending a hearing. Quite frankly, I knew that the judgeships would go out the window the minute I intend to invoke the Fifth from Justice (27) Sullivan's conversation to me and I was shook as I am right now.

Q And when you came out of the Supreme Court Chambers were you confronted by your counsel?

A Patty asked me what went on? I said, Pat, I am going to testify.

Q What did your counsel advise you at that time?

A Well Patty at first said I was making a mistake and that he drew an analogy to another case and he said the only thing they can get you in for is false swearing or perjury. They have no case. I said, Pat, it is my ticket and it is my kids and I am going to testify.

Q You were concerned about your livelihood?

A Sure; concerned about it right now.

Q Now Mr. Helfant, did you keep up with the newspaper publicity in this case?

A I sure did.

Q And did you read the papers outside of the Atlantic County jurisdiction?

A Yes, sir.

Q Now was there anything to your knowledge in the newspapers with regard to the questions that Chief Justice Weintraub asked you about, your Bar Mitzvah, the liquor, the favors, the seating arrangements?

A None to my knowledge. In fact, I know there wasn't.

(28) Q When did you first read about any of these items in the newspaper?

A On December the 7th, approximately a month after my Grand Jury appearance.

MR. PERSKIE: With the Court's permission, may I have this marked?

THE COURT: Yes, you may have it marked.

(Newspaper article was marked P-3 for identification.)

Q I show you P-3 for identification and ask you if this is the newspaper article where you first saw these items I have referred to?

A This is the beginning. This is the first in the beginning of a few other articles, but this is the first time that it appeared in a newspaper to my knowledge.

Q And the date of that newspaper is what?

A December 7, 1972.

Q And what newspaper is that?

A The Press, published in Atlantic County.

MR. PERSKIE: I offer this if the Court please.

THE COURT: May be marked.

(Newspaper article was received and marked Exhibit P-3 in evidence.)

MR. PERSKIE: That's all I have.

(29) CROSS EXAMINATION
BY MR. LAIRD:

Q Mr. Helfant, how long have you been a lawyer in the State of New Jersey?

A Since nineteen hundred and fifty-three.

Q And how long have you been a Municipal Judge?

A I was appointed in Somers Point, New Jersey in April of nineteen hundred and sixty and served there up until 1969, when I was not reappointed; then reappointed again in June of '72 and I have been serving up until the leave of absence in Galloway Township, New Jersey from —don't hold me to the date Mr. Laird, but—I mean the month, but it is 1966 up until the present time.

Q Now when you appeared on October 18, you refused initially to go into the Grand Jury; is that correct?

A On advice of Mr. McGahn after he had seen Cantoni, Kravitz and Schusterman, he said, I don't even want you to go into the Grand Jury Room.

Q Did you then attend a hearing before Judge Kingfield?

A Yes, I did.

Q That hearing was in open Court, was it not?

A Well, there was some conversation in Chambers Mr. Laird, between Mr. Hayden and Mr. McGahn while I was in the Corridor; then it was in open Court.

Q There was a hearing in open Court?

(30) A Yes.

Q After that you returned into the Grand Jury; is that correct?

A Well, yes, we returned. We couldn't get a cab, we ran back.

Q And did you then go into the Grand Jury?

A Yes.

Q Now after that testimony, did you not have a conversation with Mr. Hayden with respect to the case involving an ice machine?

A No, sir. I had another conversation with Mr. Hayden.

Q Did you have a conversation with respect to Judge Rauffenbart?

A No, sir. I had a conversation with Mr. Hayden about why don't I cooperate with him and give him somebody in Atlantic County.

Q Did you have any discussion with him about a stolen watch?

A No, sir.

Q Now when you returned November 8th, I believe when you appeared before the Supreme Court?

A Yes, sir.

Q Now at any time did any member of the Supreme Court threaten to move against you to remove your license?

A Absolutely not.

(31) Q Did they threaten at all to remove you as a Municipal Judge?

A No, sir, not verbal threats; no, sir.

Q It is a fact, is it not, that at least approximately three weeks prior thereto you had indeed taken the Fifth Amendment before the Grand Jury?

A Yes, sir.

Q And there had been no action taken against you, had there, as a lawyer or Municipal Judge?

A No, sir; that's what upset—

Q Excuse me.

A That's what upset me. They would call 3:30 on a Monday afternoon and tell me to be there without notice, without any reason and tell me to be there at 9:50 in the morning when I had a Grand Jury appearance and I was nervous enough about that.

Q Did they indicate what the consequences of your—

A They didn't discuss anything with me Mr. Laird, other than what are my intentions and do I think it right.

Q Did Mr. Hayden threaten to take any action against you to have your license removed?

A Mr. Hayden didn't threaten in that manner. Mr. Hayden said if I didn't cooperate—

Q Just answer the question.

A About the Supreme Court?

(32) Q No, did Mr. Hayden threaten to take any action against you to have your license removed as a lawyer; yes or no?

A Not to take it away from me, no.

Q Did he threaten to take any action to remove you as a Municipal Judge?

A No.

Q Did he at all times advise you of your rights before you testified?

A In the Grand Jury Room, yes.

Q Now you stated today that the Chief Justice said at the conclusion, I believe, of your little meeting with them, "What do you intend to do today?" Now is it not a fact Mr. Helfant that you filed affidavits in this particular case over two months ago?

A I filed some affidavits, yes, sir.

Q And did you not in that affidavit discuss what went on in the Supreme Court Chambers?

A Somewhat, yes.

Q And did you ever say that the Chief Justice had said, "What do you intend to do today?"

A The Chief Justice didn't—

Q Could you just answer the question?

A No, I didn't say that at all.

Q All right. Thank you. Mr. Hayden and Mr. Sullivan filed affidavits in this case as you know, almost two months (33) ago and in that affidavit of Mr. Hayden, he indicated that you did have a discussion with him after your taking the Fifth Amendment on October 18?

MR. PERSKIE: If the Court please, I would object to Mr. Hayden's affidavit. Mr. Hayden is a party defendant in this matter. He hasn't appeared. We tried to get him to state in Court on innumerable occasions what his position was and he has refused to do so. He's claimed a privilege; he's claimed a certain right of interdepartmental—

THE COURT: Affidavits are on record. How can I disregard them?

MR. PERSKIE: Because I think the man should be here subject to cross examination.

MR. LAIRD: That's his opinion and the affidavits have inded been on record and I am cross examining this witness.

THE COURT: You may proceed, Mr. Laird.

BY MR. LAIRD:

Q Now I will return to it. Those affidavits by Mr. Hayden and Mr. Sullivan were, in fact, submitted over two months ago. In the affidavit of Mr. Hayden he states and I can quote it to you—let me get it right—excuse me just a minute, your Honor.

(34) THE COURT: All right.

Q Paragraph three of the affidavit he states, "That upon leaving the Grand Jury around 5:30 or 6:00 P.M.,

Detective Sullivan and I spoke briefly to Helfant. Helfant was then informed that the State Grand Jury was also investigating his connection with an ice machine, which was procured by Abe Schusterman with a bad check and ultimately given to Judge Thomas Rauffenbart and Helfant expressed a desire to testify about this matter."

Now Mr. Helfant, that was on record for almost two months before you took any issue with that statement. Is it your testimony now that you directly refute that statement?

A Absolutely. There is not such conversation. It was the conversation I related to.

Q Thank you. Is it not a fact that you did not respond in your affidavit for at least two months to that particular statement?

A I don't know whether Mr. Perskie responded or not to that affidavit.

Q Well, it is your affidavit, is it not?

A My affidavit attached to this proceeding.

Q Anywhere in the proceeding did an affidavit in this proceeding respond to that statement within those two months?

A I don't know.

Q Thank you. You stated that you were very concerned (35) about your livelihood and whether you might lose your license to practice and whether you might be removed as a Municipal Judge, when you appeared before the Supreme Court Chambers. Were you not equally concerned three weeks earlier when you went into open Court and it became a matter of public record that you indeed took the Fifth Amendment, a lawyer and a judge took the Fifth Amendment before the Grand Jury?

A Of course I was concerned Mr. Laird; but I was acting on advice of Mr. McGahn after we saw the nature of the State's witnesses, the caliber of the State's witnesses.

Q And Mr. McGahn's advice to you after your appearance before the Grand Jury was not to testify, was it not?

A On the 18th?

Q On the 8th?

A After I left the Supreme Court?

Q After you left the Supreme Court?

A No one in this world could have made me take the Fifth.

Q You did not act on his advice?

A No, sir.

REDIRECT EXAMINATION
BY MR. PERSKIE:

Q Was any counsel with you or invited in with you to the Supreme Court Chambers?

(36) A No, sir.

Q Did you put your entire conversation with the Supreme Court in the prior affidavits filed in this matter?

A Mr. Perskie, if you recall, I made you rewrite that affidavit four or five times, because I was very reluctant to file any affidavit about any proceeding with the Supreme Court, because I was then, as I am now, concerned about my confrontation with the Supreme Court.

MR. PERSKIE: That's all I have.

THE COURT: I'd like to ask one question of Mr. Helfant if I may. I want to ask you about the affidavit which you have filed and I want to ask you whether or not this statement was in it if you can recall, and this I am quoting from the context of the papers on file. "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment."

THE WITNESS: Yes, sir.

THE COURT: That is your statement?

THE WITNESS: Yes, sir.

THE COURT: Thank you, sir. You may step down.

(37) MR. PERSKIE: If your Honor please, with all due respect to the Court, that is taken out of context and I'd like to have the balance of the paragraph read into the record.

THE COURT: All right, you can read it.

MR. PERSKIE: This is the balance of the paragraph, is it not Mr. Helfant? "However, from the very fact that I was summoned there, and from the comments of the Chief Justice and Mr. Justice Sullivan, I was concerned that in the event I concluded I should not testify, the Supreme Court might have taken some action against me because of my refusal." That is the balance of your sentence?

THE WITNESS: Yes, sir.

THE COURT: That was your assumption?

THE WITNESS: Yes, sir, because—

THE COURT: Nothing was said by the Court that that would happen?

THE WITNESS: No, sir; but I imagined from the fact that they did not discuss anything else with me except the questions that were later posed to me at the Grand Jury, and frankly, the Chief Justice's tone to me, I decided I was going to testify.

(38) THE COURT: Thank you very much.

THE WITNESS: Your Honor, there is no question pending, but may I say something to the Court?

THE COURT: No. It is very unusual even from a lawyer. You have a counsel here representing you.

THE WITNESS: May I be excused for one second to discuss something with counsel and resume the stand?

THE COURT: All right.

(Discussion off the record.)

THE WITNESS: I have nothing further, your Honor.

THE COURT: All right gentlemen, thank you.

(Mr. Perskie argued on behalf of the plaintiff.)

(Mr. Laird argued on behalf of the defendants.)

° ° °

CERTIFICATE

I, DOROTHY C. BOSS, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the testimony and proceedings had before me.

/s/ Dorothy C. Boss
DOROTHY C. BOSS, C.S.R.

Dated: May 10, 1973

ADDENDUM "B"

UNITED STATES DISTRICT COURT

District of New Jersey

Oral Opinion — No. 607-73
Before: Hon. John J. Kitchen, U.S.D.J.
Dated May 9, 1973, Camden, New Jersey

(2) THE COURT: Gentlemen, after considering the briefs and the affidavits submitted by the parties, and the oral arguments of counsel and testimony, this Court has determined that the plaintiff's petition to preliminarily enjoin the pending State Criminal Prosecution against him should be and is hereby denied.

Although this Court has jurisdiction in a suit brought under the 1938 Section to issue an injunction against a State Criminal Proceeding under the recent case of Mitchum, but in my opinion the plaintiff has failed to establish that federal intervention here is permissible under the guidelines of Younger versus Harris.

Younger and its companion cases set out a narrow exception to the broad and well settled policy that Federal Equity Courts should not intervene into pending State Criminal Proceedings.

They set out, in order for the federal intervention to be proper, Younger holds that the plaintiff must establish that the State Prosecution was brought in bad faith in order to harass the defendant. Second: That the irreparable harm to the defendant must be both great and immediate and must be more than those (3) injuries that are usually incidental to every criminal proceeding. Third: That the threat to the plaintiff's federally protected rights

must be one that cannot be eliminated by his defense against a single criminal prosecution.

Although this case does not present a challenge to the constitutionality of a State Statute, Younger does apply since the focus of Younger on intervening in pending State Criminal Proceedings which is exactly the relief sought here.

Applying the above guidelines of Younger to the facts of this case, the Court finds that the allegations by the plaintiff do not establish that the prosecution was initiated in bad faith for the purpose of harassing the plaintiff, nor for the alleged purpose of coercing the plaintiff to involuntarily relinquish his Fifth Amendment rights against self incrimination in order to obtain indictments against him for false swearing. From the record before this Court, it appears that the prosecution of the plaintiff grew out of an on-going State Grand Jury Investigation into alleged acts of misconduct that had been initiated prior to the (4) incidents alleged by the plaintiff.

The plaintiff has failed to establish irreparable harm which is both great and immediate. The only harm alleged by the plaintiff is that harm incidental to the defense of a criminal prosecution. The defense of a criminal charge based on an indictment that is alleged to be constitutionally defective does not amount to that degree of harm required as one of the prerequisites to Federal Injunctive Relief.

The plaintiff's defense to the state criminal charge against him does afford him an adequate method to seek vindication of his constitutional rights. For this Court to hold otherwise, this Court would have to assume that the State Trial and Appellate Courts would not review plaintiff's contention impartially and fairly; an assumption which this Court is not willing to make.

In addition, the defendant's motion to dismiss the complaint for lack of jurisdiction is also denied, however, because the only relief requested in the complaint is injunctive, the defendant's motion to dismiss for failure to (5) state a claim is hereby granted.

You may prepare the order Mr. Laird.

MR. PERSKIE: Could we obtain a temporary restraint pending the making of appeal to the Circuit Court?

THE COURT: No, I won't do that Mr. Perskie.

All right. Court's adjourned.

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CERTIFICATION

I, DOROTHY C. BOSS, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate partial transcript of the testimony and proceedings had in the above entitled cause.

/s/ Dorothy C. Boss
DOROTHY C. BOSS, C.S.R.

Dated: May 9, 1973

ADDENDUM "C"

Letter Dated October 31, 1972 to John F. Callinan from Patrick T. McGahn, Jr.

John F. Callinan, Esq.
3311 New Jersey Avenue
Wildwood, New Jersey

Re: In the Matter of Edwin Helfant
Our File No. 2751

Dear John:

In the absence of Marvin, I want to tell you that Ed Helfant has been subpoenaed once again before the New Jersey State-wide Grand Jury on November 8th. It is his intention to take the Fifth Amendment.

As you know, we were up there once before and I enclose herewith a copy of that transcript in which he was compelled to go before the Grand Jury and take the Fifth. My position was that he should not have to go before the Grand Jury when he is the target of the investigation. I am having Jerry Gross check the law on the subject and I would like you to do likewise. A starting point, I believe, is State v. C. Robert Sarcone, 93 N.J. super 501.

I would appreciate it likewise if you would have one of your fellows prepare a memorandum on this subject because time is of the essence and no doubt, we will wind up again before Judge Kingfield.

Yours cordially,

/s/ Patrick T. McGahn, Jr.
For McGAHN & FRISS

ADDENDUM "D"

Affidavit of Samuel Moore

STATE OF NEW JERSEY:

ss:

COUNTY OF ATLANTIC :

SAMUEL MOORE, of full age, duly sworn upon my oath according to law, depose and say:

1. Some time in August of 1972, while in my office at 533 Guarantee Trust Building, Atlantic City, New Jersey, I received a visit from William P. Sullivan, of the New Jersey State Police. He said, "This investigation does not concern you, this concerns Helfant." A brief discussion ensued concerning the Cantoni case, then he left.

2. About a week later, Detective Sullivan returned to my office and gave me a subpoena for the following Wednesday to appear before the State Grand Jury in Trenton. The following Wednesday I went to Trenton at the scheduled time of 1:00 P.M., and sat in the corridor until 5:00 P.M., and the Grand Jury was excused without my ever having been called before them. Detective Sullivan then called me into a room adjoining the Grand Jury room, and I met Deputy Attorney General Hayden for the first time. There were three other people in the room, whose identities were unknown to me.

3. Hayden then asked me what I knew about Helfant's involvement in the Cantoni matter. I replied I did not know anything about the Cantoni matter. Hayden then requested me to tell him anything I knew about Helfant. I told him I knew nothing about Helfant of my own knowledge. I was excused after three-quarters of an hour,

without ever having been before the Grand Jury, even though my subpoena was to appear before the Grand Jury.

4. I was subsequently served with another subpoena to appear before the Grand Jury by Detective Sullivan, and proceeded to Trenton on the following Wednesday, and arrived at the designated time, which I think was 11:00 A.M. I waited in the corridor for over five hours, without ever being called before the Grand Jury on this occasion. The Grand Jury was dismissed, and Sullivan once again requested I come into the anteroom. I am sure that the same unidentified people were there with Mr. Hayden. Hayden once again began to question me about Helfant, and what I could tell him about Helfant. I told Mr. Hayden what I told him on the previous occasion, that I knew nothing about Helfant. I asked him if he wanted me to lie and make up some stories about Helfant, and he said, "No, we just want to know about Helfant," and he went into the Cantoni matter again. Mr. Hayden refused to believe anything I said, and I said to him, "You don't want to believe me—you would rather take the word of a drug pusher who is in State Prison." I was once again dismissed without ever being brought before the Grand Jury.

5. I received a third subpoena from Detective Sullivan, and I told him I had a vacation planned, and would not appear the following Wednesday, as I was leaving for a vacation on Monday. Due to my failure to appear, a warrant had been issued for my arrest, and upon my return I had to appear in Trenton on October 25, 1972 before Superior Court Judge Kingfield. While sitting in Judge Kingfield's waiting room for one-half hour with my attorney, L. Milton Freed, of Atlantic City, Deputy Attorney General Hayden and Detective Sullivan came out of Judge Kingfield's chambers just before Judge Kingfield came out to ascend the bench. They were in there at least one-half

hour, as I was sitting there for that period of time. My attorney asked if this matter could be heard in chambers, and Hayden insisted that it be heard in open Court. Judge Kingfield then ascended the bench, and Mr. Hayden requested that I be incarcerated. The Judge then sentenced me to one day in jail and fined me $100.00. My attorney informed the Court that I was to appear in front of the Grand Jury. Judge Kingfield then released me in the custody of my attorney for the purpose of appearing before the Grand Jury. I testified in front of the Grand Jury and then Detective Sullivan took me to the Mercer County Jail, where I was confined until 4:00 P.M.

6. On November 6, 1972, I received a call from the Administrative Director of the Courts, who told me that the Supreme Court wanted to see me at 9:50 A.M. on November 8th. I proceeded to Trenton and arrived there late due to the inclement weather, and went right before the Supreme Court in chambers. The first question from Chief Justice Weintraub was whether I had called Detective Sullivan a "prick." This was a question that was asked in the Grand Jury session of October 25th. I had brought my file with me and had all the papers in front of me, not knowing what the Supreme Court was going to ask, as Mr. McConnell did not tell me what the Supreme Court wanted, but I assumed it was about the Cantoni matter. The Chief Justice then asked if I had a copy of the Cantoni Complaint with me, and when I told him I did, he asked me if he could have same. Helfant's signature was discussed.

7. Then there was some discussion about the $1500.00 check which had been located in Feinberg's office, and the Chief asked me what kind of office Feinberg had, and I told him it had a fine reputation. I then stated to the Chief Justice that Sullivan should have told me he found

the $1500.00 check in Feinberg's office, and the Chief said Sullivan is under no obligation to tell me anything about an official investigation. I was then excused by the Court.

/s/ Samuel Moore
SAMUEL MOORE

NOTARIZED

ADDENDUM "E"

Opinion in United States v. Mandujano

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

TUTTLE, Circuit Judge:

On May 2, 1973, appellee Mandujano appeared as a witness before the DALE (Drug Abuse Law Enforcement) Grand Jury, pursuant to a subpoena. The following warnings were given Mandujano:

"Q Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?

A Do I answer all the questions you ask?

Q You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

A Yes, sir.

Q You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully. in other words, if you lie about certain questions, you could possibly be charged with perjury?"

Mandujano was further advised that he could have an attorney outside the grand jury room; however, he was not told that he had a right to have appointed counsel outside the grand jury room, that what he said could be

used against him in later proceedings, and that he had a right to remain silent.[1]

A federal narcotics agent had reported that in March, 1973, he offered Mandujano money for the purchase of heroin and gave him $650 for the attempted purchase. The government attorney who questioned Mandujano before the grand jury testified at the motion to suppress that he had discussed with the agent the circumstances of this attempted buy in preparation for Mandujano's appearance before the grand jury. Evidence taken on the motion to suppress also showed that the government attorney requested suggestions for witnesses to be subpoenaed before the grand jury from the agent who had dealt with Mandujano and the agent recommended calling Mandujano and then reported to the attorney how the actual attempt had occurred.

Mandujano was asked the following questions, inter alia, by the government attorney before the grand jury:

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1. Actually Mandujano told the government attorney that he didn't have the money to get a lawyer. The following conversation transpired between them:

"Q Have you discussed your presence here with anybody?

A My wife.

Q Have you contacted a lawyer in this matter?

A No, sir, I haven't.

Q I take that to mean that that you do not wish the services of a lawyer here today?

A I don't have one. I don't have the money to get one.

Q Well, if you would like to have a lawyer ,he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A Yes, sir.

Q Is that clear?

A (Nod affirmative)."

At no time was Mandujano told that an attorney would be furnished him free of charge if he were financially unable to employ one.

Q Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?

A No, sir.

Q Are you sure of that?

A Yes, sir.

Q In other words, no one has ever come up to you and wanted to buy heroin?

A No, sir.

Q And you have never told anybody that you would try to get heroin to sell to them?

A No, sir.

Q Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year?

A I don't understand you, sir.

Q Have you talked to anybody about selling heroin to them during the last year?

A No, sir.

Q Are you sure about that?

A I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.

Q Has anyone ever asked you if they could buy an ounce of heroin or more from you?

A No, sir.

Q Let me ask you once again Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?

A No, sir.

Q No one has ever given you any money—

A No.

Q —to go buy them heroin?

A No, sir.

Q In other words, if you had $650 right now—

A Yes, sir.

Q —Do you think you would be able to purchase an ounce of heroin? . . ."

This interrogation tracked the exact facts of the actual contact between the federal narcotics agent and Mandujano.

The appellee was subsequently indicted in count 1 under 21 U.S.C.A. § 846 for attempt to distribute one ounce of heroin on or about the 29th of March, 1973, and in count 2 under 18 U.S.C.A. § 1623 for making false representations. The perjury count was based on Mandujano's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The district court granted appellee's motion to suppress his testimony before the grand jury, finding that appellee was a virtual or putative defendant in custody under the Miranda[2] decision, and therefore should have been given all Miranda warnings. United States v. Mandujano, 365 F. Supp. 155 (W.D. Tex. 1973). The district court determined that the warnings given were inadequate and that appellee could not be deemed to have voluntarily waived his Fifth Amendment right to remain silent. Appellee was convicted under count 1 for attempt to distribute heroin, without use of his grand jury testimony.

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2. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1965).

I. "PUTATIVE OR VIRTUAL" DEFENDANT

[1] Given the nature of the investigation and the questions tendered by the government attorney, the district court held, and this Court agrees, that full Miranda warnings should have been accorded Mandujano who was in the position of a virtual or putative defendant. The district court aptly portrayed the circumstances warranting the fact finding that Mandujano was a virtual or putative defendant during his appearance before the grand jury:

"The government maintains that neither case was considered for presentation to the grand jury prior to the testimony of the defendants before that body, and that both files had been closed following the contact between the defendants and the law enforcement officers; nevertheless, the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecutions. The special attorney who had conducted the questioning testified that he was well aware of the previous contact with the defendants in attempts to buy from them, as well as the exact circumstances involved in each attempted buy. The transcript of the grand jury proceedings reveals deliberate and careful attention to questions which specifically delved into the facts concerning these contacts between the defendant and government agents. The special attorney was aware that no case had been made, and though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants. The government had in fact already attempted to make a case against each defendant. Note too that each defendant, immediately after denying any contact about an attempted sale, was asked in the very next question about the validity of that answer . . . Considering the totality of the circumstances

in this case, the questioning of the defendants before the grand jury smacks of entrapment. Moreover, given the fact that the investigatory files involving the attempts to buy from both defendants had been closed, the questions posed presented a high likelihood that the answers provided by the defendants would furnish material for further action on the part of the government. If the defendants admitted that they had offer to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. See United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967), cert. denied, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed.2d 282 (1968); United States v. Montos, 421 F.2d 215 (5th Cir.), cert. denied, 397 U.S. 1022, 90 S.Ct. 1262, 25 L.Ed.2d 532 (1970). The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them." United States v. Mandujano, 365 F. Supp. at 158-159 (W.D. Tex. 1973).[3]

We construe the foregoing statements by the trial court to be findings that the government had focused upon Mandujano as someone whom the government had knowledge of having committed a crime, as a person whom the government had planned to indict as it had one eye on prosecution, and against whom it was gathering incriminating evidence. Also the discussion indicates that the trial court found that when Mandujano was brought into the grand jury room, the government then knew that an

3. The reference to "defendants" is made in the plural because the district court issued a joint opinion for this case and United States v. Rangel, 365 F. Supp .155 (W.D. Tex. 1973), because it found that the two cases, though not consolidated and not involving the same transaction, embodied a virtually idential set of circumstances.

affirmative answer to questions put to him would amount to a confession of guilt of trafficking in heroin.

Although this Court has recently pretermitttd the question of the scope of Miranda in the context of a putative defendant before a grand jury investigation, United States v. Morado, 454 F.2d 167 (5th Cir. 1972) and Mattox v. Carson, 424 F.2d 202 (5th Cir. 1970), cert. denied, 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed. 2d 51 (1971), we have recognized that as a general rule a grand jury witness is not entitled to warnings of his right to appointed counsel and his right to remain silent.[4] The Court of Appeals for the Sixth Circuit, however, has carved out the exception that when a person ceases to be merely a witness in a general investigation and becomes placed "virtually in the position of a defendant," then the full panoply of rights under Miranda due a person in custody must be afforded. See United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); United States v. Fruchtman, 282 F. Supp. 534 (N.D. Ohio 1968), cert. denied, 400 U.S. 849, 91 S. Ct. 39, 27 L.Ed.2d 86 (1970); Stanley v. United States, 245 F.2d 427 (6th Cir. 1957).[5]

In United States v. Morado, supra at 173, we have already recognized the force of the argument that if an investigation has passed beyond the stage of a general inquiry and has focused upon the defendant, then the defendant would be in the position of a virtual defendant:

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4. Morado, supra, at 173. Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959 (3rd Cir. 1967); United States v. Winter, 348 F.2d 204 (2d Cir. 1965); United States v. Parker, 244 F.2d 943 (7th Cir. 1957); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955).

5. In United States v. Fruchtman, supra, in circumstances similar to the instant case, the court found the witness to be a virtual defendant. There the government attorney submitted an affidavit denying that the witness was a potential defendant at the time of questioning; yet, the court noted that this attorney had also read investigative reports detailing the circumstances about which the witness was questioned before the grand jury. These facts are similar to those here, where the special government attorney read the narcotics agent's report prior to the grand jury session.

"Without intimating whether this circuit will agree with this 'virtual defendant' perspective, we note that its emphasis is upon the same factor we have considered to be of prime importance in determining whether or not a man is 'in custory' as that term is used in Miranda: 'has the focus of the investigation centered upon him?' United States v. Phelps, 443 F.2d 246 (5th Cir. 1971); United States v. Akin, 435 F.2d 1011 (5th Cir. 1970); United States v. Montos, 421 F.2d 215 (5th Cir. 1970); Bendelow v. United States, 418 F.2d 42 (5th Cir. 1969); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968). If the investigation in the case at bar had passed beyond the stage of being a general inquiry into an unsolved crime of a suspected conspiracy, and had focused upon Solis as a defendant whom the government planned to indict and against whom it was gathering incriminating evidence, we would face the necessity of embracing or rejecting this rule."

The language in Morado is particularly applicable in the case at bar because this investigation clearly had passed beyond the stage of general inquiry into an unsolved crime, and had focused upon the defendant as someone whom the government had planned to indict as it had one eye on prosecution, against whom it was gathering incriminating evidence, and against whom indictments were actually returned.[6] The fact that the questioning attorney

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6. This Court in Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972), discussed at length the application of Miranda, stating: "Before law enforctment officers can subject a ciitizen to custodial interrogation, he must first have been given the Miranda warnings. In Miranda 'custodial interrogation' was defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [4] This court has yet to formulate a general rule for distinguishing custodial from non-custodial interrogation but instead has preferred to take a case-by-case approach.[5] . . . In making the distinction between custodial and non-custodial interrogation this court has singled out certain criteria as having special significance; these include probable cause to arrest, subjective intent of the police, subjective belief of the defend-

immediately pounced upon Mandujano's denial that he had been contacted about the sale of heroin, indicated a clear and direct focus upon Mandujano as a future defendant. Moreover, the government attorney even mentioned the precise figure—$650—which had purportedly been given to Mandujano by the federal narcotics agent, plainly demonstrating that the previous transaction was clearly in the attorney's mind.

Also there was no basis for the perjury count of the indictment until after Mandujano's grand jury appearance. When the government attorney, aware of the alleged prior transaction, asked Mandujano about any previous heroin solicitation or sale, he knew that any truthful answer by Mandujano would be incriminating and therefore protected by the Fifth Amendment which Mandujano was entitled to plead. Thus, if the attorney proceeded to question actually anticipating an answer, he must have known that the response would require Mandujano to confess to a crime or commit perjury. The likelihood of Mandujano confessing a crime before the grand jury was certainly de minimis. The inference is easily drawn that the attorney's questioning was primarily baiting Mandujano to commit perjury. As perceived by the district court this case "smacks" of entrapping Mandujano to incriminate himself or commit perjury. His only "safe harbor" was to remain silent—a right of which the government failed to inform him.

The government asserts that since Mandujano negotiated for a heroin sale with the federal narcotics agent which did not result in a distribution due to appellee's being unable to procure heroin from his sources, therefore the government agents concluded that appellee must have

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ant, and focus of the investigation.[7] Although none of these factors is alone determinative, we have recently indicated that the most compelling is whether or not the focus of the investigation has finally centered on the defendant.[8]"

had knowledge of a source for heroin. Consequently he was called before the grand jury only to obtain intelligence regarding known heroin sources, consistent with the purposes of the grand jury, and not in an attempt to obtain incriminating or perjurous statements from him. Nevertheless, as concluded by the district court, "the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecution." Moreover, the questions tendered by the government attorney simply could have inquired whether Mandujano knew any heroin dealers rather than focusing on whether anyone had ever solicited heroin from him.

Moreover, the warnings that were given were not adequate advisement even of the appellee's Fifth Amendment rights against self-incrimination. As pointed out by the trial court, the questioning attorney "stressed not the right to remain silent, but the requirement that the defendant answer all he questions put to him, with limited exceptions. He did not stress the alternative of the defendant remaining silent in the face of a potentially [here certainly] damaging question."

Under the circumstances of this case, this Court agrees that Mandujano was a putative defendant in custody and was entitled to Miranda warnings.

II. REMEDY FOR FAILURE TO GIVE MIRANDA WARNINGS

The more difficult issue here is whether the usual remedy for failure to give constitutional warnings, i.e., suppression of the testimony, can ever be employed in a situation where the testimony itself amounted to perjury.

Appellant relies heavily on United States v. Orta, 253 F.2d 312 (5th Cir. 1958), to convince us that "[u]nder no

circumstances" can a grand jury "witness" commit perjury and then successfully claim that the Constitution affords him protection from prosecution for that crime. Witness Orta was charged with having committed perjury at a grand jury investigation. The district court suppressed Orta's grand jury testimony, but this Court reversed, broadly stating, supra at 314:

"It is clear that the protection of the Fifth Amendment relates to crimes alleged to have been committed before the time when the testimony is sought. A witness, ignorant and uninformed of his constitutional rights, would not intelligently waive them if he testifies, thinking that he was compelled to do so. He might answer truthfully and thereafter assert the constitutional guaranty. Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime. As said in Glickstein v. United States 1911, 222 U.S. 139, 142, 32 S. Ct. 71, 73, 56 L.Ed. 128: ' ° ° ° the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'

"The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness. In United States v. Scully, 2 Cir., 1955, 225 F.2d 113, 116, the Court of Appeals for the Second Circuit held:

' ° ° ° the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.'

"That holding is applicable to the present record. *There is no showing that the Grand Jury before which Orta*

testified was seeking to indict him or any other person already identified." (Emphasis supplied).

Although clearly holding that a mere "witness" uninformed of his rights before the grand jury, even one concerning whom there is a "mere possibility" of indictment, may not commit perjury with impunity, the Orta court sounded the important caveat that the question of supervision of the conduct of government representatives in the interest of fairness may be debatable in some circumstances. The language in the Orta opinion, supra at 314,

> "There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified."

highlights the important distinction between Orta and this case, demonstrating the wisdom of the caveat concerning the court's duty of supervision "in the interest of fairness." The instant case does not involve a mere "witness," but a putative, and subsequently actual, defendant. The facts showed that there was a mere possibility that a witness may later be indicted, but that the government deliberately suboenaed a putative defendant before the grand jury primarily for the purpose of obtaining incriminating or perjurous statements against him and mainly in order to elicit evidence helpful in indicting him. Several decisions of this Court, such as Orta, Daniels, Glasco, Stassi and Wilcox,[7] have involved perjurous testimony and the adequacy of the instruction as to constitutional rights; however, the precise issue of a putative defendant who was primarily called before the grand jury for the purpose of obtaining incriminating or perjurous statements and mainly in order to elicit evidence helpful in indicting him

7. United States v. Orta, 253 F.2d 312 (5th Cir. 1958; United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974); Stassi v .United States, 401 F.2d 259 (5th Cir. 1968); United States v. Wilcox, 450 F.2d 1131 (5th Cir. 1971).

has not been presented to this Court. Although there are factually overlapping features of the cases to be discussed, we have concluded that the totality of circumstances in the case at bar calls clearly for this Court to affirm the district court's suppression of Mandujano's testimony before the grand jury.

[2] As heinous as the crime of perjury is under our law, and as correct as the Orta principle is, that a witness uninformed of his constitutional rights generally should not be afforded a license to commit perjury, under our law, we simply cannot ignore the unfairness in baiting this defendant before the grand jury and overlook the principle that the Fifth Amendment must always be as broad as the mischief against which it seeks to guard. In order to deter the prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or perjurous testimony, the accused must be adequately apprised of his rights, or all of his testimony, incriminating and perjurous, will be suppressed. In order to combat these methods the Fifth Amendment privilege must be fully honored in this situation. This end entails only slight erosion of the general principle announced in Orta. This deviation in the situation of a putative defendant uninformed of his Miranda rights and called for the purpose of obtaining incriminating or perjurous testimony is necessary to counteract the fundamental unfairness of allowing a defendant to be faced by such a Hobson's choice.

In distinguishing Orta, we distinguish the other cases, cited above rendered after the date of Miranda, which reaffirmed the Orta principle (pre-Miranda), as none of these decisions concerned the situation of a putative defendant entitled to, but unadvised of, his Miranda warnings. The problem here is the problem adverted to in the

dictum in Orta, and not the problem adjudicated by the Orta holding or by any other decisions of this Court. As previously indicated, the grand jury was not seeking to indict Orta and Orta was not a putative defendant entitled to Miranda warnings. Orta was an ordinanry witness entitled to a general Fifth Amendment warning.

The district court apparently determined that in view of the subsequent holding in Miranda, there was now an essential difference between a prosecution for perjury when there have been no Miranda warnings and the suppression of testimony under the exclusionary rule, when such warnings have not been given, i.e., that although the indictment could not have been dismissed, the testimony could nonetheless have been suppressed. This distinction would be a facile solution to the difficult question here, were it not for the language in United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974), intervening between the district court's decision in the case at bar and the instant appeal, indicating that Orta had "post-Miranda vitality." In Glasco the defendant witness, who was in custody for another crime, had perjured himself when testifying in the trial of another defendant and the court held that a motion to suppress was properly denied. Again, however, Glasco concerned entirely different facts, and an entirely different procedure. Glasco was not put up as a witness to give evidence incriminating himself. He had already pleaded guilty to the same offense. Here, the agent reported that he believed Mandujano had committed the narcotics offense charged in count 1, and the government proceeded to subpoena Mandujano before the grand jury and asked him the precise questions dealing with a transactions that led to his being indicted by this same grand jury. Moreover, since Glasco appeared at a trial as a defense witness, he apparently appeared voluntarily and not by the compulsion of a subpeona issued on behalf of the government.

Furthermore, the two cases cited in Glasco, Wilcox and Stassi, also involved factual circumstances so dissimilar from those of the instant case that they need not be discussed. Both cases quoted from the Orta opinion.

One final case, United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972), which was noted by the district court, discusses the applicability of Orta to persons who commit perjury before a grand jury. Grand jury witness Daniels signed a "Waiver of Privilege Against Self-Incrimination" which advised that a witness could consult with an attorney outside the grand jury room but contained no statement with respect to the appointment of counsel for indigent witnesses, and proceeded to give perjurous testimony to the grand jury. Daniels conceded that generally there is no right to counsel for ordinary witnesses appearing before the grand jury, but argued that when an indigent witness who is advised that he may have an attorney present, must also be advised that if he is unable to provide his own counsel, one will be appointed for him free of cost. Finding that Daniels was "only a witness" and "was not under indictment when he appeared," the court held that he was not entitled to appointed counsel. The important distinguishing factors are that Daniels did not argue that he was entitled to Miranda warnings, but only contended that since a witnesses could have retained counsel, he should have been advised that indigent witnesses may have appointed counsel free of cost. Furthermore, the court clearly delineated that Daniels was only a witness and not a putative defendant. Therefore, the latter portion of the decision which concludes that Daniels, even if entitled to counsel and deemed not to have waived his rights, would still have no license to perjury is a reaffirmation of the general principle announced in Orta and is to be distinguished completely from the situation of a putative defendant entitled to Miranda warnings who is called

before the grand jury for the purpose of obtaining incriminating or perjurous testimony.

[3] We reiterate that the Orta principle that witnesses uninformed of their constitutional rights should not be allowed a license to commit perjury continues with full force. We only make a slight inroad that where a totally unfair procedure is put in train—as when there is a factual determination that a person who is subpoenaed before the grand jury and questioned about an alleged crime, was already known to the satisfaction of the prosecuting agency prior to the grand jury appearance to be guilty of that precise crime—, elemental fairness requires that such a person is under such compulsion as to require that he be given the Miranda warnings, and that failure to do so must require suppression of any incriminating testimony given by him even though he is being prosecuted for giving false testimony.

[4] The remaining question arises from the principle that the Fifth Amendment protection against self-incrimination extends only to past acts, not to those that are or may be committed in the future. As stated in Glickstein v. United States, 222 U.S. 139, 32 S. Ct. 71, 56 L.Ed 128 (1952) [quoted by the Orta court, as stated infra], " • • • the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." The appellant urges that when the defendant Mandujano appeared before the grand jury, he had not committed the perjury and that his criminal liability concurred with his utterance before the grand jury. Therefore, the perjury indictment was not premised upon evidence of past acts obtained from the mouth of the defendant, but was based on a crime whose very commission, rather than evidence of commission, was the defendant's testimony. Glickstein v. United

States, supra, concerned a bankrupt who was indicted for perjury for having falsely sworn in a bankruptcy proceeding while under examination before a referee.

Once again, we must point to the distinguishing characteristics in the facts and the proceedings in this case. The entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the pale of permissible prosecutorial conduct.[8] We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment.

We, of course, do not attempt an axiomatic definition of due process, but note the well known language from Betts v. Grady, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L.Ed. 1595 (1941), overruled on other grounds, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1962):

" 'Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.' "

Although the application of the standard set in Betts v. Brady, supra, was overruled in Gideon v. Wainwright, supra, it is clear that the test remains the same. Was the conduct (refusal to appoint counsel) so "offensive to the

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8. As did the trial court, we refrain from placing blame on any one official for what turned out to be conduct "smacking" of entrapment. We recognize the fact that involved here were an agent who reported to his superior, and then a special attorney having designated duties in the field of narcotics investigation and prosecution, and finally the United States Attorney and his staff. Somewhere within this chain of command and information, a decision was made to subpeona as a witness a man to whom the original agent testified he had given $650 for a "score," and to ask this witness about this specific transaction.

common and fundamental ideas of fairness" as to amount to a denial of due process. 316 U.S. at 473.

We conclude simply that the proceedings here complained of met that standard.

We believe this not to be inconsistent with any prior decision of this Court, all of which dealt only with the specific rights guaranteed by the self-incrimination clause of the Fifth Amendment.

The judgment is affirmed.

Supreme Court, U. S.
FILED
OCT 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, Jr., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, Jr., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, Jr., and MARK A. SULLIVAN of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of the Case

On July 8, 1974, the Court of Appeals for the Third Circuit, sitting *en banc,* rendered its decision in *Helfant* v. *Kugler, et al.,* —— F. 2d —— (3 Cir. 1974).[1] Distilled to its essence, the majority concluded that the New Jersey Supreme Court's disciplinary investigation, which immediately preceded petitioner's appearance before the State Grand Jury, constituted such "extraordinary circumstances" as to compel federal intervention in a pending State criminal prosecution. This novel holding was premised upon petitioner's assertion that the State Supreme Court's preliminary inquiry into his ability to continue to preside as a municipal court judge compelled him to waive his Fifth Amendment privilege against self-incrimination. Succinctly stated, the majority decided that the "factual involvement of the Supreme Court would destroy the objectivity of the entire State [judicial] system in processing [petitioner's] constitutional claim" (A15). Although rejecting petitioner's application for an injunction, the majority directed that the case be remanded to the district court "for the entry of an order temporarily enjoining" the trial of the State indictment and for a "determination of whether Helfant's testimony before the grand jury . . . was the product of a free and unconstrained will" (A4).

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[1] A three judge panel of the Court of Appeals had previously rendered a decision on September 7, 1973. See *Helfant* v. *Kugler, et al.,* 484 F.2d 1277 (3 Cir. 1973). Immediately thereafter, we petitioned for a rehearing. The Court of Appeals then granted the petition and subsequently, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, and at our request, consented to a reconsideration of the matter *en banc.*

Three judges vigorously dissented. In their view traditional principles of comity militated against federal interference. The dissenting judges were unwilling to presume that members of the New Jersey Supreme Court would be unable to impartially adjudicate petitioner's constitutional claim or that they would seek to advance their own interests "by a devious, obsequious sycophancy" (A8). Further, the dissenting opinion disavowed the correctness of the postulate, presumably adopted by the majority, that the Supreme Court would be "so venal and vindictive as to mete out some administrative 'punishment'" in the event that a trial court accepted petitioner's theory (A28).

We immediately obtained a stay of the Court's mandate and applied for a writ of certiorari. Petitioner's unfounded contentions to the contrary, our purpose was not to prevent or to delay a public airing of the allegations set forth in the complaint. Rather, we sought further review because, in our view, this case presents delicate questions of federal-state comity. Thus, in our petition, we noted that this appeal raises the novel question of whether the "extraordinary circumstances" exception to *Younger's*[2] interdiction was intended to establish a distinct category justifying federal intervention in an ongoing state criminal prosecution in the absence of "bad faith" or "harassment" (P30). We further pointed out that the contours of the "extraordinary circumstances" exception have never been delineated and that scattered statements seem to indicate doubt on the part of several justices that such a distinct class exists (P19). See, *e.g.*, Mr. Chief Justice Burger's opinion in *Allee* v. *Medrano*, —— U. S. ——, ——, 94 S. Ct. 2191, 2211 (1974), and Mr. Justice Black's opinion in *Perez* v. *Ledesma*, 401 U. S. 82, 85 (1971). We

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[2] *Younger* v. *Harris*, 401 U.S. 37 (1971).

emphasized that if a separate category exists at all, it must be equated with the unavailability of a state forum for remedying the claimed constitutional deprivation. See Mr. Justice Brennan's opinion in *Perez* v. *Ledesma, supra* at 93. Our petition stressed that the State courts could impartially resolve petitioner's Fifth Amendment claim and that there was no basis for federal intervention. We pointed out that it is the constitutional duty of the New Jersey Supreme Court to initiate disciplinary proceedings and that there was nothing ominous in its conference with petitioner. Under these circumstances, we considered it a slur on the entire State judicial system to presume, as the majority below evidently did, that individual judges incapable of remaining impartial would not disqualify themselves pursuant to settled New Jersey practice (R. 1:12-1; R. 1:12-2) and that members of our highest court would refuse to obey the law they are bound to enforce. No malevolent intent having been shown, we further urged that there could be no violation of petitioner's Fifth Amendment privilege. That is so because "coercion", in the constitutional sense, requires a compelled waiver of a right by virtue of some unlawful act or unconscionable promise. Finally, we noted that petitioner had utterly failed to allege a constitutional injury which was both great and immediate. If petitioner was coerced into testifying, that would in no sense provide him with a license to lie. Thus, the false swearing charges would retain their efficacy. Further, with regard to the substantive charges, petitioner's testimony before the grand jury was not incriminatory. Hence, there is no likelihood that his statements will be used against him. It is indeed difficult to perceive what "great, immediate and irreparable" injury confronts the petitioner so as to justify federal intervention.

Although Helfant has not filed a document labelled an "answer," he has undertaken to respond to our petition by filing a cross-application for a writ of certiorari. We deem the cross-petition an answer to our initial petition. The sole question raised in the cross-petition relates to the majority's refusal to issue an injunction barring prosecution. Petitioner concludes by asking this Court to deny our petition and to review the Court of Appeals' decision to direct declaratory but not injunctive relief. This answer is in opposition to petitioner's cross-application. It would, of course, be fruitless to recount the facts at length since our petition contains a complete recital of the salient features of this case. Rather, our argument which follows refers to what we perceive to be the pivotal facts necessary for this Court's determination.

Reasons for Denying the Cross-Petition for a Writ of Certiorari

In our petition for certiorari, we suggested that Helfant had not displayed the candor required of a suiter in equity.[3] We suggested that the complaint alleged sundry factual matters, but did not disclose their context so that the reader might glean the nature of the asserted constitutional injury. The necessary basis for such an understanding required an explanation of the purpose of the conference between the Supreme Court and petitioner. As to this, we stressed that Helfant neither stated the ob-

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[3] Story, *Equity Pleading*, §23, p. 16 (9th ed. 1879). See also Adams, *Doctrine of Equity*, p. 303 (1873); Barton, *History of a Suit In Equity*, p. 42 (1847).

ject of the meeting nor asserted that the Supreme Court had not made the purpose perfectly plain to him.[4]

Helfant continues his course of studied ambiguity. In our petition, we noted that the Supreme Court did not institute any proceeding against Helfant or against Judge Moore. That is beyond dispute. There was no complaint, order to show cause or order suspending either of them from sitting in their respective courts. The purpose of the conferences with both men was to learn whether they would agree not to sit pending disposition of the charges before the grand jury. We noted in our petition that each of them agreed not to sit, thereby obviating the need to consider whether to institute proceedings for such interim suspension. As the basis for that inference we noted that court records, which may be judicially noticed, revealed that neither Helfant nor Moore presided in their respective courts following their meetings with the Supreme Court. We further alluded to Helfant's admission during the hearing on his application for a preliminary injunction that he had taken a "voluntary leave of absence" (CPA16). In support of the proposition that the conferences were for the purpose we have stated, our petition described Helfant's undisputed testimony regarding Chief Justice Weintraub's abject refusal to discuss the merits of the charges before the grand jury as to which petitioner had previously invoked the Fifth Amendment privilege. So too, Helfant, in an affidavit annexed to his complaint stated that the Chief Justice "did not want to [discuss] the merits of the matter and rightfully so."

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[4] Helfant, in his complaint, alleged that the Administrative Director did not advise him as to the purpose of the conference (A66). But the complaint does not state that petitioner was not apprised by the Supreme Court with respect to the object of the conference.

Thus, Helfant swore that the Chief Justice considered a discussion of the merits of the criminal charges beyond the purpose of the meeting. Yet he persists in obscuring the object of that conference. Rather, referring to an affidavit executed by Judge Moore (we will presently comment upon that affidavit), Helfant says in his cross-petition (CPA9):

> ". . . this belies the allegation of the State that the Court was *merely* attempting to determine whether the two judges intended to remain on the bench in their temporary positions." (emphasis ours).

We have italicized the word "merely". This is as close as petitioner comes to acknowledging that the stated purpose was indeed to discuss whether he and Moore would agree not to sit pending resolution of the charges before the grand jury. Helfant seems to be saying in his quoted statement that, notwithstanding the Court's admonition, it secretly harbored an intention to explore the merits of the underlying criminal charges. This is plainly belied by the record.

The relevant fact, so far as this litigation is concerned, is that the Supreme Court did not order petitioner to waive his Fifth Amendment privilege or threaten reprisal if he declined. Nor did the Court offer any reward to encourage Helfant to testify. This Helfant concedes.[5] We re-

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[5] The following colloquy between petitioner and the State's attorney plainly belies Helfant's contention that the Court's secret intention was to coerce him into testifying:

> "Q. Now when you returned November 8th, I believe when you appeared before the Supreme Court?
> A. Yes, sir.

(Footnote continued on following page)

peat that the Fifth Amendment was not the focus of the meeting. Judge Moore, who had previously testified freely before the grand jury, was dealt with in precisely the

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(Footnote continued from preceding page)

Q. Now at any time did any member of the Supreme Court threaten to move against you to remove your license?

A. Absolutely not.

Q. Did they threaten at all to remove you as a Municipal Judge?

A. No, sir, not verbal threats; no, sir.

Q. It is a fact, is it not, that at least approximately three weeks prior thereto you had indeed taken the Fifth Amendment before the Grand Jury?

A. Yes, sir.

Q. And there had been no action taken against you, had there, as a lawyer or Municipal Judge?

A. No, sir; that's what upset—

Q. Excuse me.

A. That's what upset me. They would call 3:30 on a Monday afternoon and tell me to be there without notice, without any reason and tell me to be there at 9:50 in the morning when I had a Grand Jury appearance and I was nervous enough about that.

Q. Did they indicate what the consequences of your—

A. They didn't discuss anything with me Mr. Laird, other than what are my intentions and do I think it right.

Q. Did Mr. Hayden threaten to take any action against you to have your license removed?

A. Mr. Hayden didn't threaten in that manner. Mr. Hayden said if I didn't cooperate—

Q. Just answer the question.

A. About the Supreme Court?

Q. No, did Mr. Hayden threaten to take any action against you to have your license removed as a lawyer; yes or no?

A. Not to take it away from me, no.

Q. Did he threaten to take any action to remove you as a Municipal Judge?

A. No." (CPA26-27).

same fashion as was Helfant, who had asserted his Fifth Amendment privilege.[6] An agreement was sought from each not to preside pending resolution of the charges.[7]

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[6] As noted in our petition, Helfant had previously appeared before the same grand jury on October 18, 1972, when he invoked his Fifth Amendment privilege. He was, thereafter, requested to reappear on November 8, 1972. Plainly, no adverse inference can be drawn against the Attorney General by virtue of the decision to resubpoena petitioner after he had previously asserted his Fifth Amendment privilege. As Helfant acknowledges, the grand jury was investigating other charges pertaining to Abe Schusterman. One charge was that Helfant arranged for a gift of an ice machine by Schusterman to a County Court judge who was scheduled to sentence him in several unrelated criminal matters. Helfant was subpoenaed to testify regarding those other events on November 8, 1972. Helfant's attorney testified that he could not recall whether petitioner wished to invoke the Fifth Amendment privilege with respect to those matters (A13-14).

[7] We add that Moore's affidavit (which is annexed to the cross-petition) is not part of the record in this case. Helfant included this affidavit in his brief in the Court of Appeals. Although we objected to this offer, the court below never ruled upon our motion to strike. In any event, the alleged reference to Helfant's signature on the withdrawal endorsement (A39) which appeared on the criminal complaint for atrocious assault and battery merely reflects Moore's testimony before the grand jury on October 25, 1972. Moore's testimony with reference to Helfant's signature is quoted at length in Count V of the indictment involved in these proceedings. As that testimony reveals, the clerk of Judge Moore's court testified that Moore directed him to dismiss the criminal complaint. Moore testified that he had nothing to do with the criminal complaint, and pointed an accusing finger at Helfant. Moore swore that Helfant's signature appeared on the withdrawal endorsement. We will again refer to Moore's testimony of October 25, 1972, as set forth in the indictment, in discussing the claim in the cross-petition that the State was guilty of foul tactics in subpoenaing Helfant to testify before the grand jury. Our point, at this juncture, is that the Moore affidavit in no sense conflicts with our contention that the purpose of the meeting with the Supreme Court was as we have stated.

In point of fact, Helfant's own affidavit states that he volunteered the statement that he "would testify without invoking the Fifth Amendment."[8]

We will deal first with the issue upon which the Court of Appeals divided, *i.e.*, whether federal intervention was warranted by virtue of Helfant's assertion that the Supreme Court "coerced" him into waiving his Fifth Amendment privilege. It bears repeating that petitioner's contention must be viewed against the backdrop of his damaging concession that no member of the Supreme Court ordered him to testify or threatened sanctions if he did not withdraw his previous assertion of the Fifth Amendment. Helfant's position, at its best, is that he harbored a fear that if he refused to testify, members of the Supreme Court would violate their oaths of office and visit some hurt upon him. In our petition, we argued that, as a matter of law, "coercion" in the constitutional sense cannot be found in the exercise by the Supreme Court of its constitutional responsibility with respect to members of the bench and bar. Nor can "coercion" be found in any apprehension a judge or an attorney may claim in response to the existence or exercise of that constitutional power. It would serve no valid purpose to repeat at length our argument in that regard. Suffice it to say, there are many pressures that come to bear on a defendant in a criminal trial, but not every "compelling"

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[8] The cross-petition states that ". . . the true coercive purpose of the Court was borne out by the very last question posed to Helfant by the Chief Justice: 'What do you intend to do today?'" (CPA8). If petitioner seeks to suggest that the Chief Justice initiated a discussion of waiver of the Fifth Amendment privilege, his own affidavit plainly belies that contention. Helfant, in that affidavit, swore that he volunteered the statement regarding his intention to testify.

influence leading to a decision to testify violates the Fifth Amendment. See *e.g.*, plurality opinion of Mr. Chief Justice Burger in *California* v. *Byers*, 402 U. S. 424, 427 (1971); *McGautha* v. *California*, 402 U. S. 183, 213 (1971); *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970); *Harrison* v. *United States*, 392 U. S. 219, 222 (1968). Rather, the Fifth Amendment privilege is rooted in the desire to protect against governmental misconduct. See *e.g.*, *Michigan* v. *Tucker*, —— U. S. ——, ——, 94 S. Ct. 2357, 2361-62 (1974). As we noted in our petition, the mere existence of the removal or disciplinary powers cannot be found to constitute "coercion" no matter how overwhelmed a judge or an attorney may say he is because of the existence of the Court's constitutional responsibility. We stress, at this posture of the case, that the cross-petition does not respond to our contention. Rather, Helfant says only that there was some misconduct which had a coercive effect upon him. We submit, however, that there is nothing in the pleadings or the proof which could support that claim.

In our petition for certiorari, we contended that, for still other reasons, there was no basis for federal intervention with respect to the self-incrimination issue. For the purpose of analysis, we separated the counts of the indictment charging substantive offenses (conspiracy to obstruct justice, obstruction of justice and compounding a felony) from those charging Helfant with false swearing in his testitmony before the grand jury. With regard to the substantive counts, we pointed out that petitioner's testimony was wholly exculpatory, and hence there was no conceivable basis for intervention. At best, petitioner's claim would not justify the issuance of an injunction since it is beyond cavil that reception before a grand jury of evidence procured in violation of an individual's constitutional rights does not serve to vitiate

the resulting indictment. See *e.g., United States* v. *Calandra*, —— U. S. ——, 94 S. Ct. 613 (1974); *United States* v. *Blue*, 384 U. S. 251 (1966); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1966); *Holt* v. *United States*, 218 U. S. 24 (1910). When a witness has been wrongfully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coerced testimony and its derivative use. *Kastigar* v. *United States*, 406 U. S. 441 (1972); *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U. S. 472 (1972); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). Here, there was no need for judicial intervention since the State had stipulated that Helfant's grand jury testimony would be used, if at all, only to impeach any inconsistent statement he might utter were he to testify. We pointed out that the constitutional injury sought to be averted was thus conjectural, depending for its very existence upon a hypothetical series of events that is most unlikely to occur.

We emphasize that Helfant does not respond in any meaningful way to our argument. In short, he does not even attempt to support the basis for intervention upon which the majority rested its judgment; *i.e.*, that there was a triable issue as to whether Helfant's will not to testify was overborne. Rather, Helfant's cross-petition speaks only to the counts charging false swearing. We pointed out in our petition that the majority in the Third Circuit did not discuss our contention that the Fifth Amendment privilege does not excuse or justify the commission of perjury or false swearing, notwithstanding that the dissenting opinion dealt a length with that issue. As properly noted by the dissenting judges, perjury cannot be "self-incriminatory," since the scope of the Fifth Amendment privilege "does not endow the person who testifies with a license" to lie. *Glickstein* v. *United States*,

222 U. S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U. S. 77, 82 (1969); *United States* v. *Kahriger,* 345 U. S. 22, 32 (1952). *Cf. Acanfora* v. *Montgomery City Board of Education,* —— U. S. ——, 42 U.S.L.W. 2439 (1974); *Bryson* v. *United States,* 396 U. S. 64, 72 (1969); *Dennis* v. *United States,* 384 U. S. 855, 867 (1966); *Kay* v. *United States,* 303 U. S. 1, 6 (1938). Even assuming that petitioner testified before the grand jury because he feared removal from office or disbarment, see *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973); *Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Comm'n,* 392 U. S. 280 (1968); *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Spevack* v. *Klein,* 385 U. S. 511 (1967), that would not permit him to lie with impunity. See *People* v. *Genser,* 250 Cal. App. 2d 351, 58 Cal. Rptr. 290 (1967); *People* v. *Rucker,* 45 Ill. 2d 562, 262 N. E. 2d 456 (1970); *People* v. *Goldman,* 21 N. Y. 2d 152, 287 N.Y.S. 2d 7, 234 N. E. 2d 194 (1967). If petitioner's testimony was compelled, as he contends, the "coercion" exercised was to testify truthfully, not falsely.[9] Any other conclusion would reduce the witness' oath to a meaningless shibboleth.

Significantly, Helfant's cross-petition fails to state whether the majority in the Third Circuit in fact dealt with this issue. More than that, Helfant does not challenge the validity of the authorities which we presented and upon which the dissenting opinion relied. Rather, petitioner now advances a totally different claim. Specifically,

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[9] The factual pattern here is to be distinguished from a situation in which the government has unlawfully coerced a witness to testify to certain facts. Where the witness has been forced to testify falsely, a perjury charge might well be a violation of the Fourteenth Amendment. But here, there is no allegation that Helfant was compelled to lie. Rather, petitioner's contention is that he felt himself compelled to testify.

he contends that there was "entrapment" or some violation of due process for the Attorney General to summon him before the grand jury allegedly for the sole purpose of instituting false swearing charges.

Our response to the issue Helfant seeks to inject is as follows. First, this issue is simply not in the case. The complaint did not make this allegation, nor was such a charge advanced or accepted by either the district court or the Third Circuit.[10] Second, there is nothing in the record to support it. In substance, Helfant contends that because the State advised him that he was a "target", it must follow that the Attorney General expected him to lie. He argues that the Attorney General summoned him before the grand jury for the sole purpose of adding the false swearing charges to the substantive counts. But to say that a witness is a "target" is not to suggest that the investigation is completed. Nor does it necessarily follow that an indictment against such a witness is a certainty. It means only that information in the possession of the grand jury may lead to an indictment.[11] It is not uncommon for a "target" to accept, and even to insist upon, an opportunity to testify in the hope that an indictment will not ensue. This is especially true with respect to men in public life, as to whom the bare fact of an indictment is harmful whatever the outcome of the ultimate trial. Moreover, there is no basis in the record for a charge that the Attorney General was guilty of

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[10] See *e.g.*, *Tacon* v. *Arizona*, 410 U. S. 351 (1973); *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Nelson* v. *City of Los Angeles*, 362 U. S. 1 (1961); *Wilson* v. *Cook*, 327 U. S. 474 (1946).

[11] See *e.g. In re Addonizio*, 53 N. J. 107, 248 A. 2d 531 (1968); *In re Boiardo*, 34 N. J. 599, 170 A. 2d 816 (1961); *State* v. *DeCola*, 33 N. J. 335, 164 A. 2d 729 (1960).

bad faith in summoning Helfant. The only relevant part of the record in this connection is the Fifth Count of the indictment. There appears the testimony of Judge Moore's clerk to the effect that the judge ordered him to dismiss the complaint for atrocious assault and battery saying that the county prosecutor had consented to that course. The same count further notes that on October 25, 1972, Judge Moore swore before the grand jury that his clerk had lied and that he (Judge Moore) had nothing to do with the dismissal. To the contrary, Judge Moore testified that Judge Helfant was the culprit and that the latter's signature appeared on the withdrawal endorsement. Thus, the record starkly reveals that it was incumbent upon the grand jury to determine whether to indict Judge Moore or Judge Helfant or both. In light of the conflicting testimony then before the grand jury, it was fair, rather than oppressive, to summon Judge Helfant. Our third response to this new allegation is that it could not justify intervention by the federal judiciary. The focus of Helfant's attack is upon the Attorney General, not upon the Supreme Court, and thus there could be no basis to assume that the State judiciary would not fairly adjudicate the issue.

The cross-petition continues to urge that the Supreme Court violated the State and Federal Constitutions, by requesting the grand jury testimony and communicating with the Attorney General with regard to the status of the criminal investigation. We pointed out in our petition that the Supreme Court is charged by the State Constitution with the administration of the judicial system including the removal of judges and the discipline of attorneys. *Constitution of New Jersey,* Article 6, Section 6, paragraphs 2 and 3, and *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. See also *N.J. S.A.* 2A:1B-1, *et seq.* We think it plainly frivolous to

say, as petitioner asserts here, that any constitutional concept bars this essential role. We note that the majority opinion nowhere indicated that it found any merit in that issue, for as already noted, the court below ordered intervention only with respect to the allegation that Helfant's will to plead the Fifth Amendment was overwhelmed.

We pointed out in our petition that no constitutional injury was presented by virtue of the Supreme Court's communications with the Attorney General. The allegations presented to the grand jury, if true, plainly justified the initiation of disciplinary proceedings against Judge Helfant, Judge Moore, or both. Surely, the Attorney General was duty-bound to apprise the Supreme Court of these serious charges. Petitioner's unsupported assertion to the contrary, the separation of powers doctrine is not offended when one branch of government cooperates with another. Nor can a constitutional issue be generated by petitioner's naked assertion that there was "collusion" between the Supreme Court and the Attorney General. Surely, a litigant cannot precipitate federal intervention in a state criminal proceeding by the mere willingness to allege "collusion" or "corruption" or the like, and to rest that charge upon the mere fact that the Supreme Court took steps which are perfectly consistent with propriety and the discharge of its constitutional responsibility.

In this connection, we comment upon the footnote which appears at page 18 of the cross-petition. Helfant there says that the record does not contain proof of the communications between the Supreme Court and the Administrative Director. He further asserts that the record is barren of any evidence relating to the Supreme Court's practice of initiating disciplinary proceedings during the

pendency of related criminal investigations. All of this is a matter of record within the Supreme Court and as such may be judicially noticed. In point of fact, as we specifically noted in our petition, this practice has been recognized and approved by the Third Circuit. See *DeVita* v. *Sills*, 422 F. 2d 1172 (3 Cir. 1970).[12] But even if this were not judicially noticed, it would not matter. It can be of no moment as to how the Supreme Court learned of the grand jury inquiry. Nor would it be significant if Judges Moore and Helfant were the only ones ever called into such a conference. It is perfectly sensible and reasonable to explore the possibility of an agreement not to sit pending resolution of criminal charges against a judge.

Petitioner also contends that the Supreme Court "deprived [him] of the right to counsel" (CP27-28). We do not know whether Helfant seeks to create the impression that the Supreme Court refused to permit counsel to attend the conference. If that is the thrust, then we point out that there is no such allegation in the complaint and nothing in the record to suggest a factual basis for such a charge. The right of a judge (or an attorney) to have counsel with him has never been denied, and Helfant nowhere says otherwise.

Equally unpersuasive is petitioner's contention that the majority failed to consider his allegation of bad faith. In our petition, we said that it was conceded that neither

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[12] In a related context, this Court has held that civil and administrative hearings need not await the conclusion of related criminal charges. See *United States* v. *Kordel*, 397 U. S. 1 (1970). See also *United States* v. *Simon*, 373 F. 2d 649 (2 Cir. 1967), *cert.* granted *Simon* v. *Wharton*, 386 U. S. 1030, vacated as moot, 389 U. S. 425 (1967).

bad faith nor harassment were present in Helfant's prosecution. In a footnote (P29), we added that "bad faith" and "harassment" signify that a prosecution is being instituted with no reasonable hope or expectation of obtaining a valid conviction.[13] In no sense does petitioner's con-

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[13] "Bad faith" and "harassment" signify that a prosecution is being instituted or threatened with no reasonable hope or expectation of obtaining a valid conviction. *Perez* v. *Ledesma*, 401 U. S. 82, 85 (1971). Under such circumstances, it is plain that the federal plaintiff's constitutional rights cannot be vindicated in the state criminal trial. *Ibid. Honey* v. *Goodman*, 432 F. 2d 333 (6 Cir. 1970), is illustrative of "bad faith" prosecutions. There, plaintiffs mailed letters to persons protesting the arrest and trial of several persons. As a result, they were charged with the offense of embracery. The plaintiffs petitioned the federal court to enjoin their prosecution, on the grounds that the prosecutions were instituted in bad faith, with no real hope of ultimate success, for the sole purpose of deterring them from the expression of unpopular ideas. The district court dismissed the complaint. On appeal, the Court of Appeals held that the lower court had erred in dismissing the suit because if the plaintiffs proved that the prosecution had been instituted without expectation of ultimate success and for the purpose of discouraging the exercise of their rights, they would have proven the bad faith necessary to secure an injunction against a pending State proceeding. See also *Eames* v. *Pitcher*, 468 F. 2d 905 (5 Cir. 1972); *Holmes* v. *Giarusso*, 319 F. Supp. 832 (E. D. La. 1970).

The factual pattern in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), is similar. There, the appellants had offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten the initiation of new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents

(Footnote continued on following page)

clusory allegation of "bad faith" meet this standard. Judge Moore's testimony, as set forth in the indictment which is a part of the record in this case, plainly reveals petition-

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(Footnote continued from preceding page)

were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes.

Federal relief against a pending state prosecution was also granted in *Shaw* v. *Garrison,* 467 F. 2d 113 (5 Cir. 1972). The plaintiff had been charged with conspiring to assassinate President Kennedy and was found not guilty. Following his acquittal, the District Attorney secured an indictment charging the plaintiff with committing perjury at his trial. The federal court enjoined the perjury prosecution because it believed that there was a serious question as to whether the conspiracy charge had any basis and it found that the prosecutor had taken extreme measures in extracting information from the State's witnesses, thus raising serious questions as to the validity and objectivity of the State's case. The Court issued the injunction in order to prevent the District Attorney from hounding an innocent person.

A state prosecution was also enjoined in *Krahm* v. *Graham,* 461 F. 2d 703 (9 Cir. 1972). There, bookstore owners were charged with violating obscenity statutes. Eleven cases came to trial and none resulted in convictions. As a result, city officials instituted more prosecutions against the store owners. The federal court issued an injunction against the prosecutions because the multiplicity of charges filed against the plaintiffs made it impossible for them to raise their constitutional claims in a single criminal proceeding.

The foregoing cases illustrate the kind of conduct by state authorities that would constitute "bad faith" or "harassment" and which would give rise to a right to federal equitable relief during the pendency of a state prosecution. The cases can be divided into two categories: (1) where a prosecutor brings a prosecution with no expectation of securing a conviction, and (2) where state authorities have pursued a course of continuous harassment,

(Footnote continued on following page)

er's involvement in a criminal enterprise. Petitioner's own complaint sets forth the undisputed fact that other witnesses had appeared and had testified before the grand jury and, further, that their "testimony if believed would incriminate" him (A68). Succinctly stated, no triable issue was presented with respect to the allegation of bad faith.

Finally, we reply to that part of the cross-petition that says our application should be denied because the judgment of the Third Circuit is interlocutory. We dealt

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(Footnote continued from preceding page)

characterized by repeated arrests and prosecutions. Proof that a prosecutor has engaged in the conduct outlined above merits federal intervention in the state criminal process only because it clearly demonstrates that the prerequisite to federal injunctive relief, i.e., irreparable harm or the inability to remove the threat by defense against a single criminal prosecution, has been met. When a prosecutor secures an indictment against an individual without expectation of securing a conviction, he is not interested in bringing the case to trial. Consequently, if the defendant were not entitled to federal relief, he would be left without a forum in which to assert his constitutional rights. Similarly, the criminal defendant who is subjected to continuous harassment and repeated prosecutions needs the assistance of the federal courts if his constitutional rights are to be protected because even a successful defense of those rights in the state courts results in further prosecution. Such a defendant cannot eliminate the threat to his constitutional rights in defending a single criminal prosecution.

Plainly, nothing in the complaint reveals bad faith in bringing the prosecution in this case. Nor does Helfant's new claim of entrapment, first raised in his cross-petition, support a finding of bad faith. As we have noted, even assuming that Helfant was "entrapped," there is no reason to presume that the State court system cannot properly adjudicate that issue. Clearly, Helfant's constitutional rights can be vindicated in a single prosecution in the State courts.

with that question in our petition (P64) and stressed the need for an immediate review of the issues we had raised. We pointed out that there would not be an opportunity for us to seek a review of a favorable final judgment. In that regard, we emphasized the extraordinary import of the Third Circuit's judgment upon the relations between the federal and state judiciaries. Although the majority thought its decision could have no precedential impact outside of New Jersey, we noted that other states had similar judicial systems. We repeat that the impact of the Third Circuit's decision cannot be minimized. In this connection, we invite this Court's attention to a resolution recently adopted by the Conference of Chief Justices at its meeting in Hawaii on August 9, 1974 (Addendum A). This resolution alludes to the problem of judicial administration and the effect of federal intervention upon it. We ask this Court to grant our petition for a writ of certiorari and to deny petitioner's cross-application so that these significant issues can be resolved.

CONCLUSION

For all the foregoing reasons, we respectfully pray that our petition for a writ of certiorari be granted and the cross-petition be denied.

Respectfully submitted,

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[ADDENDUM FOLLOWS]

ADDENDUM

Resolution VIII

WHEREAS, the Conference of Chief Justices in 1971 endorsed the efforts of the Chief Justice of the United States to improve the channels of communications between state and federal courts and to eliminate abrasiveness in state-federal judicial relationships; and

WHEREAS, much improvement between state and federal judicial relations has resulted from an interchange of ideas and a discussion of mutual problems between state and federal judges through State-Federal Judicial Councils; and

WHEREAS, in recent months there have been in a few federal district courts and circuit courts of appeals certain decisions which threaten to negate the effectiveness of efforts to improve state and federal judicial relationships in that these federal courts, below the United States Supreme Court level, unreasonably have invaded areas which historically and traditionally are recognized to be within the exclusive jurisdiction of state courts, as for example the matter of state bar admissions and the internal administration of state court systems;

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices duly assembled in Plenary Session on August 16, 1974, as follows:

1. That each state judicial system is urged to continue its efforts to bring about a cooperative and cordial relationship between state and federal judicial systems through open communication and with the interchange of ideas and mutual recognition of

the responsibilities of each system through State-Federal Judicial Councils and other means.

2. That the "exhaustion of state remedies" doctrine must be strictly adhered to in areas which have historically and traditionally been within the exclusive jurisdiction of state courts, including state bar admissions and internal administration of state court systems and in the joint jurisdiction of the federal and state authorities; otherwise, the marked improvement in state-federal judicial relationships which has occurred in recent months will be substantially eroded.

3. That various organizations interested in proper state-federal judicial relationships, including State-Federal Judicial Councils, the Federal Judicial Center, the Administrative Office of United States Courts, the National Conference of Federal Trial Judges, the Judicial Conferences of United States Courts, and the State-Federal Judicial Relations Committee of the American Bar Association, be called upon to bring to the attention of their judicial members the importance of maintaining proper and cooperative relationship between state and federal judiciaries in the areas above delineated.

4. That Congress is called upon to enact legislation requiring the exhaustion of state judicial remedies before federal courts may entertain jurisdiction of matters which have been traditionally and historically within the exclusive jurisdiction of state court systems such as bar admissions and the internal administration of state judicial systems.

SUPREME COURT, U. S.
FILED
DEC 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, sitting *en banc*, is reported at 500 F.2d 1188. A prior opinion of a three-judge panel of the United States Court of Appeals for the Third Circuit, which had also reversed the order of the District Court and remanded the matter for an evidentiary hearing, is reported at 484 F.2d 1277.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1) (1970). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. The United States Court of Appeals for the Third Circuit granted petitioner's motion for an accelerated hearing of the appeal. The hearing was held on September 7, 1973 and on that date the three-judge panel issued a preliminary injunction against the state-court trial, pending the issuance of a full mandate. On September 10, 1973 the court issued its opinion and order reversing the order of the district court. Based upon the respondents' representation that it would not move the state-court trial pending further proceedings, the Court of Appeals recalled the mandate to allow respondents to file a motion for rehearing *en banc*. On September 21, 1973 the Court of Appeals granted their application for the rehearing *en banc*.

On July 8, 1974 the judgment in lieu of a formal mandate, reversing the order of the district court and remanding the matter to that court for findings of fact and conclusions of law was issued by the United States Court of Appeals for the Third Circuit, *en banc*. Respondents then moved to recall the mandate to allow for the filing of a petition for *certiorari* to this Court. The motion was granted on July 23, 1974 and the issuance of the mandate stayed until August 7, 1974. Respondents herein filed a petition for *certiorari*, No. 74-80, on August 6, 1974. Petitioners herein filed a cross-petition for *certiorari* on September 13, 1974.

QUESTIONS PRESENTED

1. Whether the "extraordinary circumstances" exception to the *Younger v. Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution?

2. Whether the facts of this case present "extraordinary circumstances" under *Younger v. Harris*, 401 U.S. 37 (1971)?

3. Whether the New Jersey Supreme Court in its interrogation of the Petitioner ten minutes before he was to appear to testify in the State Grand Jury, conducted with the aid of evidence supplied to the Court by the Deputy Attorney General conducting the Grand Jury proceedings, violated the doctrine of separation of powers provided for in both the Federal and New Jersey Constitutions and unconstitutionally deprived the Petitioner of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

4. Whether the conduct of the New Jersey Supreme Court and the Deputy Attorney General, taken in view of the organization of the New Jersey Court system, inflicted and continues to inflict irreparable constitutional injury upon the Petitioner, justifying federal intervention?

5. Whether the Court below erred in finding that the present case was not one of bad faith and in limiting the fact-finding to the coercion issue only?

6. Whether the Court below erred in finding the present case inappropriate for injunctive relief?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

United States Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

Constitution of the State of New Jersey, Art. 6, §2,¶3:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

N.J.S.A. 2A:1B-1:

> "2A:1B-1. Definitions
>
> 'Judge' as used herein means any judge of the superior court, county court, county district court, juvenile and domestic relations court and municipal court."

N.J.S.A. 2A:1B-2:

> "2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty,

or other conduct evidencing unfitness for judicial office, or for incompetence."

N.J.S.A. 2A:1B-3:

"2A:1B-3. Institution of removal proceedings

A proceeding for removal may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."

N.J.S.A. 2A:1B-4:

"2A:1B-4. Prosecution of removal proceedings

The Attorney General or his representative shall prosecute the proceeding unless the Supreme Court shall specially designate an attorney for that purpose."

N.J.S.A. 2A:1B-5:

"2A:1B-5. Suspension pending determination

The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days."

N.J.S.A. 2A:1B-6:

"2A:1B-6. Preparation of defense; counsel; production of witnesses and evidence

The judge shall be given a reasonable time to prepare his defense and shall be entitled to be represented by counsel. The prosecuting attorney and the judge shall have the right of compulsory process to compel the attendance of witnesses and the production of evidence at the hearing."

N.J.S.A. 2A:1B-7:

"2A:1B-7. Taking of evidence

Evidence may be taken either before the Supreme Court sitting *en banc*, or before three justices or judges or a combination thereof, specially designated therefor by the Chief Justice."

N.J.S.A. 2:1B-8:

"2A:1B-8. Rules governing

Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court."

N.J.S.A. 2A:1B-9:

"2A:1B-9. Removal

If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office."

N.J.S.A. 2A:1B-10:

"2A:1B-10. Suspension prior to hearing

No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel."

N.J.S.A. 2A:1B-11:

"2A:1B-11. Impeachment proceedings

The actions of the Supreme Court may not extend further than removal from office, but proceedings under this act shall not preclude the institution of impeachment proceedings against a judge pursuant to Article

VII, Section III of the Constitution or subjecting a judge to such criminal or penal proceedings as may be authorized by law."

Rules Governing the Courts of the State of New Jersey:

R. 1:20-2(b)—On Motion of Committee or Court.

"A committee may on its own motion and without formal complaint to it, and shall when so directed by the Supreme Court, investigate any condition or situation in the county which involves the character, integrity, professional standing or conduct of any attorney. If the committee finds evidence of unprofessional or unethical conduct it shall prepare a statement of charges, which shall be regarded as a complaint, and shall thereafter proceed in accordance with *R.* 1:20-4.

R. 1:20-4(b)—Service and Filing

"Immediately upon receipt of a complaint, the secretary shall make written acknowledgment thereof to the complainant. He shall forthwith serve a copy on the attorney named therein, either personally or by ordinary mail, and mail a copy to the Administrative Director of the Courts. The secretary shall open a separate file for each complaint and properly index it."

R. 1:20-4(c)—Answer; Preliminary Investigation.

"The attorney shall within 10 days after the service of the complaint upon him, file a written answer thereto in triplicate with the secretary, who shall thereupon forward one copy to the complainant and one copy to the Administrative Director of the Courts and then refer the complaint and answer to one or more members of the committee designated by the chairman for preliminary investigation. Such investigation shall be promptly instituted and completed by the committee member or members to whom assigned, notwithstanding the expiration of their terms prior

to the completion thereof. The committee member or members shall interview the complainant and the attorney, and conduct the investigation in such other manner it deems appropriate. Where special need therefor appears, the Administrative Director of the Courts, on the request of the chairman, may assign an official court reporter to assist in the investigation. A written report of the investigation shall be made to the entire committee, and a copy thereof forwarded to the Administrative Director of the Courts. If the attorney fails to file an answer as herein prescribed or fails to appear at the time fixed for hearing, the committee shall by letter so notify the Supreme Court, through the Administrative Director of the Courts. If the circumstances warrant, the Supreme Court may then issue an order directing the attorney to show cause why he should not be suspended pending disposition of the complaint."

R. 1:20-4(h)—Dismissal or Presentment.

"The committee shall consider and reach a determination on the matter promptly after the conclusion of the formal hearing. If it finds no unethical or unprofessional conduct, it shall dismiss the complaint, and the secretary, in writing, shall promptly so notify the complainant and the attorney, submit a written report of the committee's findings and conclusions to the Administrative Director of the Courts, and close the file in the matter. If the committee finds unethical or unprofessional conduct, the secretary shall promptly prepare an original and 9 copies of a presentment to be signed by the members of the committee concurring therein, which shall contain a summary of the matter and the committee's findings of fact. The original and 7 copies thereof together with the original and 3 copies of the transcript together with all exhibits shall be filed with the Clerk of the Supreme Court, one copy each of the presentment and transcript shall be served upon the respondent

and one copy of each shall be retained by the committee. Any members of the committee participating in the determination but not concurring in the presentment shall separately state their findings and conclusions, which statement shall be filed with, but not made a part of the presentment."

R. 1:20-4(i)—Disposition by Supreme Court.

"On the filing of the presentment the Supreme Court shall determine whether to issue an order to show cause why the respondent should not be disbarred or otherwise disciplined. If no order to show cause issues, the Clerk of the Supreme Court shall so notify the Committee and the respondent. If an order to show cause issues, it shall be served upon the respondent and filed by the committee. Within 2 weeks of the date of the order to show cause the attorney designated by the committee to prosecute the matter shall file 8 copies of his brief in support of the presentment with the Clerk of the Supreme Court and serve a copy on the respondent. Within 2 weeks of the date of service of the committee's brief, the respondent shall file with the Supreme Court 8 copies of his answering brief and serve a copy on the attorney for the committee."

R. 1:20-8—Filing of Presentment; Order to Show Cause.

"Presentments made to the Supreme Court pursuant to *R.* 1:20-4, and orders to show cause why an attorney should not be disbarred or otherwise disciplined issued by the Supreme Court, and all briefs, papers and exhibits submitted in connection therewith, shall be impounded by the Clerk of the Supreme Court and shall not be filed of record unless the Supreme Court otherwise orders or unless and until the attorney presented or ordered to show cause is disbarred or otherwise disciplined by the Supreme Court."

STATEMENT OF THE CASE

This is a case *sui generis*. Research has failed to discover anything similar on its facts and perhaps, nothing comparable will ever again arise in this or any other court. This case is brought before this Court for the review of an order granted pursuant to *Rule* 12(b)(6) and thus every allegation of the verified petition originally filed by Petitioner Helfant must be taken as true. *Littleton v. Berbling*, 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.*, 445 F.2d 422 (3rd Cir. 1971). Furthermore, this case is brought before the Court on a very limited record, a point which must be stressed. The only testimony taken was that of the Petitioner and Patrick T. McGahn, Jr., one of this co-counsel. The testimony was taken on May 9, 1973 on the return day of Petitioner's order to show cause why a preliminary injunction against the state criminal prosecution should not issue. This testimony may be found in the joint appendix herein (App. 69).*

The procedural posture of this case and the dearth of the record must be stressed because the petition in No. 74-80 is replete with factual statements that are *dehors* the record, evasions, conjecture and speculation. Petitioner is reluctant to say this, yet a simple comparison between the statement of facts in the Third Circuit *en banc* opinion and that contained in petition No. 74-80 illuminates the point. The differences, evasions, conjecture, speculation, misstatements of fact *dehors* the record and misstatements of existing facts, will be taken up below as part of the factual and legal exposition.

---

* To clarify any references to petitions, addendums and joint appendix, the addendum in the cross-petition for certiorari in No. 74-277 will be cited AH for Addendum-Helfant. When referring to the addendum in petition for certiorari No. 74-80, reference will be to AK, for Addendum-Kugler. All references to page numbers in No. 74-277 will be PH, while references to page numbers in 74-80 will read PK. All references to the joint appendix will read *App.*

The material facts of this case are a matter of record, and may be found in the verified complaint and the testimony taken in the district court. Petitioner Helfant is a member of the New Jersey Bar and municipal court judge currently on leave of absence from that position (App. 82-83). In his verified complaint dated May 2, 1973 (App. 60) Helfant alleged that some time before October 18, 1972 the State of New Jersey began a Grand Jury investigation. As part of its duties, the specially created State Grand Jury was directed to investigate among other matters, an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and battery in which the petitioner was alleged to have participated. The complaint had been filed in the Municipal Court of Egg Harbor, New Jersey. The State Grand Jury investigation in this matter was personally conducted by one of the defendants herein, Joseph A. Hayden, Jr., a Deputy Attorney General of the State of New Jersey.[1] It was alleged that Helfant represented one of the complainants who caused the complaint to be filed, that it was illegally and improperly dismissed with his help, and that Helfant actually witnessed the withdrawal signature.

It was in connection with this matter and other matters that the Petitioner, pursuant to a subpoena, appeared before the New Jersey State Grand Jury on October 18, 1972. At this time Helfant was advised that he was the target of the investigation. Upon learning of this, he refused even to go into the Grand Jury room. Accompanied by counsel, he was ordered to appear before the Assignment Judge of Mercer County, New Jersey, to determine whether, in fact, he should go into the Grand Jury room. The Assignment Judge directed Helfant to go into the Grand Jury room and, if Helfant so chose, to then rely

1. Mr. Hayden has subsequently left the Attorney General's Office and is currently engaged in private practice.

upon his Fifth Amendment rights. The Petitioner on the same date unsuccessfully appealed this ruling to the Superior Court of New Jersey, Appellate Division, and unsuccessfully attempted to appeal to the New Jersey Supreme Court. Unable to do this, he then appeared before the State Grand Jury, invoked his Fifth Amendment rights, and refused to answer any questions. Subsequently, while co-counsel Marvin D. Perskie was on vacation, a letter was directed to his partner Patrick T. McGahn, Jr., co-counsel, which indicated that Helfant was again subpoenaed to appear before the State Grand Jury on November 8, 1972 and would likewise invoke his Fifth Amendment rights at that time (App. 170).

On November 6, 1972 Helfant returned a telephone call that his office received from the Administrative Director of the New Jersey Courts. This call was made to Helfant personally, not to either of his attorneys, notwithstanding the fact that Helfant had appeared on October 18, 1972 represented by counsel. The Director informed Helfant that he was to appear before the New Jersey Supreme Court in private session on November 8, 1972 at ten minutes before ten o'clock in the morning. Helfant advised the Director that he had to be before the State Grand Jury at 10:00 A.M. The Administrative Director replied that he was well aware of that fact. He would not tell Helfant the reason for the meeting though asked to do so.

On November 8, 1972 the Supreme Court sat in private session at its chambers at the New Jersey State House Annex in Trenton, New Jersey. At the other end of the hall was the meeting room for the State Grand Jury, which was then in session.

The Petitioner appeared at the appointed time on November 8th. He was preceded into the New Jersey

Supreme Court chambers by Deputy Attorney General Hayden, who was carrying a file which now for the first time the State has revealed to be the raw grand jury minutes.[2] Helfant entered the chambers and was confronted by the Court sitting in its robes. The bench and bar of the State of New Jersey were well aware, as was Helfant, of the Chief Justice's attitude toward the use of the Fifth Amendment by attorneys and public officers. This attitude was amply expressed in *State v. Falco*, 60 N.J. 570, 292 A.2d 13 (1972) in which the Chief Justice, whom Helfant was about to meet, took issue with the policy of the United States Supreme Court that led to the decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevack v. Klein*, 385 U.S. 511 (1967).

Various members of the Supreme Court began to question him. The Chief Justice immediately inquired of the defendant whether he thought a judge should invoke the Fifth Amendment. Justice Sullivan asked what the defendant's feelings were about a judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before the Grand Jury. He also asked Helfant if he had sat as a judge since invoking the Fifth Amendment. The Chief Justice then resumed the questioning, asking Helfant questions about incidents that had been brought before the State Grand Jury and had not been made public. For example, the Chief Justice asked whether Helfant had knowledge of an ice machine that was alleged to have been illegally given to a New Jersey County Court judge. He also asked what part had Abe Schusterman, a convict who testified against Helfant in the Grand Jury, in supplying certain liquor for the Bar Mitzvah of Helfant's son. The Chief Justice also asked

2. The State has admitted in its Petition for Certiorari in No. 74-80 that the Chief Justice requested the raw grand jury minutes and the exhibits which were given to the Chief Justice (PK, 13).

about the seating arrangements at the Bar Mitzvah and who had been present. These incidents were contained in those very grand jury minutes that the Court had requested and obtained from respondent Hayden. The Chief Justice only cut off discussion about the merits of the matter in which Helfant was alleged to be involved, when Helfant tried to explain why he had previously resorted to the Fifth Amendment. The true coercive purpose of the Court was borne out by the very last question posed to Helfant by the Chief Justice: "What do you intend to do today?"

Samuel Moore, Helfant's co-defendant,[3] had also been called to the Supreme Court chambers after Helfant left. With him, he brought the original complaint which allegedly had been improperly dismissed. This is and was the central exhibit in the entire prosecution. There was affixed to the complaint a signed withdrawal allegedly witnessed by Helfant. Helfant's signature was at issue and had been the subject of expert testimony before the State Grand Jury. The Chief Justice proceeded to discuss with Moore the validity of Helfant's signature with the complaint spread out before the Court. Furthermore, the Chief Justice asked Moore about the reliability of certain law firms in Atlantic City, New Jersey which were involved in the case. In short, the New Jersey Supreme Court was considering the main exhibit in a criminal case and investigating the validity of Helfant's signature allegedly thereon, *i.e.*, the minutes of the grand jury investigation. This completely belies the allegation of the State that the Court was merely attempting to determine whether the two judges intended to remain on the bench in their temporary positions.

3. Judge Moore has subsequently died. He was not a "critical witness" as the State has characterized (PK, 62), but a co-defendant!

Helfant then emerged from the chambers. His co-counsel, who testified before the Federal District Court, dramatically described Helfant's demeanor and appearance when he emerged. Helfant was very, very upset and appeared completely white and shaken. Counsel, as stated in the record, simply could not get through to him. Against the vigorous protests of both co-counsel, Helfant indicated he would testify because he was fearful that failure to do so would result in the loss of his license to practice and of his two judgeships. Obviously, the experience and encounter with the Supreme Court had had its intended effect. Helfant's will was broken, his resolve shattered. He was literally frightened beyond the reach of legal advice. His determination shaken, the entreaties of his lawyers to no avail, Helfant walked the very short distance between the Supreme Court chambers to the grand jury room down the hall, appeared before the State Grand Jury and testified.

Prior to Helfant's testimony, the State had called before the State Grand Jury and intended to recall as witnesses, three convicted criminals who were then in State prison: John Cantoni, Sheldon Kravitz and Abe Schusterman.[4] Helfant knew that they had testified against him. Thus, when he was called before the State Grand Jury he was in an inextricable position: once he testified, and if he agreed with their testimony, he implicated himself in an alleged criminal conspiracy; if he disagreed with them, he was subject to a charge of false swearing. This was the manner in which the Grand Jury was being conducted by

4. Each one of whom received promises of immunity for their appearances and other substantial concessions and promises of recommendations for doing so, which has been admitted by the State in discovery furnished in the State criminal proceedings. As a matter of fact, Kravitz and Schusterman are now at liberty as a result of the intercession of the Attorney General's Office. Kravitz has returned to the bar business, his disqualification to hold a liquor license removed.

Deputy Attorney General Hayden and this was the procedural framework facing Helfant when he testified on November 8, 1972. The result of Helfant's testimony was an indictment charging him with conspiracy to obstruct justice, obstruction of justice, compounding a felony and four counts of false swearing.

Helfant then attempted to exhaust, to the extent available, his State court remedies with regard to the constitutional rights now raised before this Court. Initially, Helfant moved before the trial court to dismiss the indictment based upon the illegal conduct of both the New Jersey Supreme Court and the Deputy Attorney General. That motion was denied. Since the order was interlocutory in nature, there was no right of direct appeal under New Jersey law. *See, R.* 2:5-6. Under this rule, Helfant made application to the Appellate Division of the Superior Court of New Jersey, the intermediate appellate tribunal in the State of New Jersey. The Appellate Division denied the motion under *R.* 2:2-4. Helfant then moved for leave to appeal before the New Jersey Supreme Court, which motion was denied by the Supreme Court over the signature of Chief Justice Joseph Weintraub, a respondent herein (App. 42-59).

As a result of the actions of the New Jersey Supreme Court and Deputy Attorney General Hayden, on May 2, 1973 Helfant filed a verified complaint and order to show cause in the United States District Court for the District of New Jersey. The gist of his complaint may be summed up in Paragraph 14 thereof:

> "14. As a result of the intrusion by the Deputy Attorney General and the disclosure of the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation and because of the intrusion of the New Jersey Su-

preme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State Government. Plaintiff is being made to defend criminal charges which have been obtained, *inter alia*, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges had unlawfully injected itself into the prosecution of the charges aginst him and unlawfully deprived him of his constitutional rights. *The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under* 28 U.S.C. §2283 (App. 66-67) (emphasis added).

The return date of the order to show cause was May 9, 1973. On that date testimony was taken of Helfant and Patrick T. McGahn, Jr., one of his co-counsel who

was present on November 8, 1972. Some of that testimony has been cited in the Court of Appeals' *en banc* decision (App. 130-31). In essence, Helfant testified consistently with the averments of his complaint and the overwhelming and devastating effect that the encounter with the Justices had upon him. Mr. McGahn testified that Helfant had intended to take the Fifth Amendment on November 8th prior to entering the Supreme Court chambers and told how Helfant emerged shaken and distraught from the chambers and, against the advice of both counsel, and as a result of this encounter, informed counsel that he would testify.

In an oral opinion, the district court denied preliminary injunctive relief on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), precluded federal intervention. It also granted the State's motion and dismissed the complaint for failure to state a claim for which relief might be granted. As the *en banc* opinion recognized, the case came to it subsequent to a *Rule* 12(b)(6) motion.[5] As it further recognized, although an evidentiary hearing on the injunction request had been conducted and the court had made limited findings on this issue,

> ". . . it did not find facts with respect to the merits of Helfant's §1983 claim. Thus, there have been no fact findings on the crucial issue of whether Helfant's testimony before the grand jury was the product of his free and unconstrained will"[6]

Thus, as the Court of Appeals recognized and as must be stressed herein, there was only a limited record made below. Only Petitioner introduced testimony, and this testimony was wholly corroborative of his complaint. The

5. *Helfant v. Kugler*, 500 F.2d 1188, 1192 (3rd Cir. 1974).
6. *Ibid.*

State did not introduce any testimony and did not in any way seek to refute the material allegations of the complaint. To this date, unde the facade of a flurry of legal maneuvers, it has continued to avoid an examination of the facts within its control. Therefore, as the *en banc* decision below recognized "we must take as true Helfant's allegations . . . ."[7]

The case was in this procedural posture when it was brought before the three-judge panel on September 7, 1973. In an order dated September 10, 1973 and in an opinion, the three-judge panel reversed the order of the district court. Its holding first recognized that there was a distinct and separate category of "extraordinary circumstances" under *Younger* and that the present fact situation came within that special category (App. 114). It said:

> "Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category, it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced from him by the Supreme Court of New Jersey, his Fifth Amendment privilege against self-incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey and ultimately in that Court, hardly seems adequate" (App. 115).

Subsequent to this opinion, the State petitioned for a rehearing *en banc*. In an order dated October 31, 1973 the petition for rehearing before a three-judge panel was granted and the court ordered supplemental briefing on

7. *Ibid.*

the coercion issue (App. 120-21). Subsequent to the filing of the supplemental briefs, the court, in an order dated January 11, 1974, relisted the case for a rehearing before the Court of Appeals, *en banc* (App. 122). On April 10, 1974 the appeal was argued (App. 124). The opinion of that court was filed July 8, 1974. The opinion also reversed the order of the District Court and reinstated the complaint. Considerably narrowing the scope of the relief sought, however, the court remanded the case to the United States District Court for proceedings, "limited to a determination of whether Helfant's testimony before the State Grand Jury on November 8, 1972 was a product of free and unconstrained will." It ordered that the district court "issue a declaratory judgment setting forth this conclusion."[8]

The *en banc* opinion also recognized that there was a separate and distinct category of "extraordinary circumstances" under *Younger v. Harris, supra.*[9] It found that a predicate of *Younger* was an assumption that the defense of the pending state prosecution would afford an adequate remedy at law for vindication of any federal constitutional rights at issue. The court thus predicated "extraordinary circumstances" to an "inability of the state forum to afford an adequate remedy at law."[10]

The certified judgment in lieu of mandate embodying the decision of July 8, 1974 was filed by the court on that date (App. 166). The State then again petitioned the court to recall its judgment in lieu of formal mandate and to clarify its opinion regarding the four counts of false swearing contained in the State's indictment. In an order dated July 23, 1974 the Court of Appeals recalled its certified judgment in lieu of mandate and stayed the issuance

8. *Id.* at 1198.
9. *Id.* at 1193.
10. *Ibid.*

thereof until August 7, 1974. The other relief requested was denied.

Thereafter, on August 6, 1974 respondents herein filed their petition for *certiorari*, No. 74-80. On September 13, 1974 petitioner herein filed his cross-petition for *certiorari*. Both petitions were granted on November 18, 1974.

In conclusion, this case comes before this Court after two hearings in the United States Court of Appeals for the Third Circuit and after two opinions entered in that Court in favor of petitioner. Furthermore, this case comes before the Court subsequent to the granting of a *Rule* 12(b)(6) motion and upon a limited record consisting of testimony wholly favorable to the contentions of the petitioner. It is respectfully submitted that the allegations of the complaint, supported by the testimony below, show that this is a case of "extraordinary circumstances," justifying Federal intervention by way of injunction in the State court proceedings. Further, as the record indicates, this is a case in which there has been manifest bad faith on the part of the State, both in the inception of the prosecution against Helfant and the manner in which it was handled. It is respectfully submitted that this is a case for Federal injunctive relief to cure, by way of prophylactic rule, massive due process, Fifth Amendment and Sixth Amendment violations found in the State's prosecution of Helfant.

SUMMARY OF ARGUMENT

This case brings before the Court a factual complex that is probably *sui generis*. Alleged in the complaint are allegations that the highest court of the State of New Jersey collaborated with a Deputy Attorney General conducting an on-going State Grand Jury investigation to coerce the petitioner Helfant, through a procedure entirely devoid of due process, into foregoing his Fifth Amendment rights. It is further alleged, and admitted by the respondents, that in pursuance of its aim, the court demanded, received, and improperly considered grand jury minutes and exhibits of a grand jury investigation which was then confidential and had not been concluded.

It is further alleged that the same Deputy Attorney General divulged raw grand jury data to the court in violation of and in contradiction to the doctrine of separation of powers, *N.J. Const.* Art. III, §1 (1947), and the New Jersey cases, rules and statutes. This was prosecutorial misconduct and in itself constituted a further violation of due process. Lastly, petitioner alleges violations of his Fourteenth Amendment procedural due process rights and Sixth Amendment right to a fair trial and counsel arising out of the unlawful procedure utilized by the New Jersey Supreme Court to "investigate" alleged judicial misconduct by Helfant. In essence, the factual complex literally presents a "breakdown of the State judicial system . . . ." *Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2210 (1974) (Burger, Ch.J., concurring). The complaint charges that Helfant, as an individual, is being deprived of "meaningful access to the state courts . . . ." *Ibid.* Also implicit is the right of an individual to be tried in a state court system without even the hint of impartiality. Thus, some of the basic tenets of our democratic system are being brought into question.

What is involved here is illegitimate abuse of state power and a resort to our federal court system to correct the abuse. This is the situation in which the appearance of impartiality, the appearance of justice, mandates federal court interference with the State court's procedure. It is submitted that the present case represents "extraordinary circumstances" under *Younger v. Harris*, 401 U.S. 37 (1971) and that such "extraordinary circumstances" represents a distinct category supporting federal intervention in a pending state criminal prosecution. It is further submitted that if this case is not considered to be "extraordinary circumstances" then no case ever will, and the language found in the cases supporting the proposition that "extraordinary circumstances" represents a separate category allowing intervention will henceforth be of no further legal effect.

In 1971, *Younger v. Harris, supra*, and its companion cases were decided. These cases dealt with the appropriateness of federal injunctive and declaratory relief in an ongoing state prosecution. *Younger* expressed no view about the circumstances under which federal courts could act when there was no prosecution pending in State courts at the time that the federal action was begun, 401 U.S. at 41. Its companion case, *Samuels v. Mackell*, 401 U.S. 66, 73-74 (1971) reserved decision on the propriety of declaratory relief when no State proceeding was pending at the time the federal suit was begun. These questions were answered in *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974) in which the court held that federal declaratory relief was not precluded when no state prosecution was pending and a federal plaintiff demonstrated a genuine threat of enforcement of a disputed state criminal statute, whether the attack was made on the constitutionality of the statute on its face, or as applied.

The present case brings before this Court the opportunity to further clarify the *Younger* cases. The question presented by this case is whether *Younger* and its companion cases, arising as they did in the area of the First Amendment, sought to be the last word on the law of federal injunctions against pending state criminal proceedings?

Historically, the *Younger* cases arose in a time when a great number of lower federal courts had greatly extended the holding of *Dombrowski v. Pfister*, 380 U.S. 479 (1965) to encompass situations totally distinguishable from the extreme situation that had given rise to that opinion. Furthermore, while *Dombrowski* had spoken of proving both facial invalidity and bad faith before the federal injunction could issue, lower federal courts were reading this opinion in the disjunctive, to allow intervention if there was a question either of facial invalidity or bad faith.

Thus, the *Younger* cases served to once again clarify the law, and to temper the tendency of the lower federal courts to place an expansive interpretation on *Dombrowski*. *Younger* settled the question, holding that facial invalidity alone could never suffice to allow intervention—even if there was a residuary chilling effect upon First Amendment rights—as long as enforcement of the statute was in good faith and without harassment. Ordinarily, the defense to the criminal prosecution in this instance would suffice to vindicate the First Amendment rights implicated. In terms of comity, good faith enforcement of what could conceivably be an invalid statute was a legitimate state function in which the federal courts would not interfere. Thus was *Dombrowski* clarified and guidance given to the lower federal courts *in the First Amendment area.*

Thus, *Younger* recognized the confusion that had arisen in the First Amendment area and directed itself to

clarify the law in that particular factual situation. Understanding its limitations, the opinion sought to give further guidance and not foreclose future development. "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be."[11]

The present case brings before this Court the "unusual situation." On its facts, this case is extraordinary. It implicates the highest court of the State of New Jersey in a collusive scheme with a Deputy Attorney General to subject Helfant to an unconstitutional interrogation for the avowed purpose of coercing him into foregoing his Fifth Amendment rights. It presents massive violations of due process, and a conscious attempt to deprive Helfant of counsel, in derogation of his Sixth Amendment rights.

On its facts, this case brings before this Court the opportunity to find that "extraordinary circumstances"[12] does constitute a separate category allowing federal intervention in a state criminal proceeding. If these facts are not "extraordinary" then, it is submitted, what could ever be?

11. *Younger v. Harris*, 401 U.S. 37, 54 (1971).
12. *Id.* at 53-54.

ARGUMENT

POINT I

An "extraordinary circumstances" exception to the *Younger v. Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution.

As petitioner has repeatedly emphasized, the present case comes before this Court, as it twice came before the United States Court of Appeals for the Third Circuit, after the granting of a *Rule* 12(b)(6) motion. Thus, this Court must liberally construe the complaint and consider all of its allegations to be true. All doubts are to be resolved in favor of petitioner. *Littleton v. Berbling*, 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.*, 445 F.2d 322 (3rd Cir. 1971). As this Court has repeatedly emphasized, the standard in judging the complaint on appeal and the merits of the underlying action, in the present procedural context, is whether the action is so patently without merit as to justify dismissal of the complaint. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Thus, the allegations of the complaint are entirely true for the purpose of this case. Furthermore, it must again be noted that the only testimony taken on the return date of the order to show cause, May 9, 1973, was that elicited by petitioner's witnesses and that this testimony currently remains uncontradicted on the record.[13]

13. This is a crucial fact which cannot be overstressed in this Petition. Petition No. 74-80 was replete with evasions, conjecture, speculation and many statements of fact which are not in the record below. First, there is nothing in the record which discloses that Helfant's appearance before the Grand Jury "received some public notoriety and was disclosed in several newspapers in the state" (PK, 13). Furthermore, there is nothing in the record indictating that the Administrative Director of the New Jersey Courts in accordance with "settled practice" informed the Supreme Court of this

Under 28 U.S.C. §1343(3) (1970) federal courts have subject matter jurisdiction of an action commenced "[t]o redress the deprivation, under color of state law . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." 42 U.S.C. §1983 (1970) affords the federal suitor a remedy to bring "an action at law, suit in equity, or other proper proceeding for redress." And, this Court has held that this may be by means of injunction, *Mitchum v. Foster*, 407 U.S. 225 (1972) or by declaratory judgment, *Steffel v. Thompson*, 415 U.S. 452 (1974). Thus, there is no constitutional barrier, and since *Mitchum v. Foster, supra*, no absolute Congressional barrier, to federal court intervention in state criminal proceedings.

While there is no doubt that in the delicate area of federal-state relations the cases have generally held that the trial of criminal cases under state law should be left to the state courts, *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951); *Douglas v. City of Jeannette*, 319 U.S. 157, 162-

(Id.). Neither is there anything indicating that the Administrative Director was instructed to obtain a report from the Attorney General handling the matter and all relevant Grand Jury testimony (Id.). There is also nothing in the record below indicating that the New Jersey Supreme Court had directed the Administrative Director to ask both Helfant and Moore to meet with it in a private conference room on that date. There is nothing in the record indicating what the purpose of this meeting was to be (Id.). Nor was there anything in the record which indicates that the New Jersey Supreme Court is duty bound to inquire into allegations of judicial misconduct and that these investigations do not generally await the conclusion of pending or related criminal charges. Nor does anything in the record indicate that the New Jersey Supreme Court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a criminal cas (PK, 27). These misstatements cannot be over-emphasized. It is indeed sad that the State has seen fit to so destroy the actual record in this case and bring so many innuendoes and actual misstatements before this Court. Helfant takes no issue with the power of the Supreme Court of New Jersey to supervise the Judges and administer the Court system of the State nor with its power to discipline members of the bench and bar. However, a hearing on judicial impropriety without notice, without counsel, without a fair hearing, held ten minutes before a Grand Jury proceeding, finds no support in Court Rules, State Statutes, Constitutional Law or, for that matter, in anything in the American system of jurisprudence.

63 (1943), there is also no doubt, and history has recognized, that such interference has oftentimes been necessary. *See, Mitchum v. Foster*, 407 U.S. 225, 241-42 (1972).

The conditions which could support such interference prior to *Younger v. Harris* were set forth in *Dombrowski v. Pfister*, 380 U.S. 475 (1965). *Dombrowski* was generally recognized to sanction federal interference in state prosecutions in two distinct situations: (1) when a criminal prosecution was brought under a law facially invalid due to vagueness or overbreadth. Here the action was deemed to have a "chilling effect" upon the exercise of constitutionally protected rights. Thus, remedy by way of defense to the prosecution would be inadequate to protect those rights; (2) when the prosecution was brought in bad faith for the purpose of inhibiting the exercise of constitutional rights, the prosecution itself caused the injury.[14] In either instance, "irreparable injury" was said to exist. Thus, both injunctive and declaratory relief would be authorized, since the defense to the prosecution—the adequate remedy at law—would be insufficient to protect the constitutional right involved.[15]

Although *Dombrowski* appeared to speak of the necessity of proving both "facial invalidity" of the statute and "bad faith" in its enforcement, later cases appeared to speak of the requirements in the disjunctive, *i.e.*; proof of either would suffice to allow federal intervention. *See, e.g., Cameron v. Johnson*, 390 U.S. 11 (1968). Thus, it was in this context that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases were brought before the Court.[16]

14. 380 U.S. at 486-89.

15. It had long been recognized that "equity does not generally enjoin criminal prosecutions, because there is an adequate remedy at law by way of defense to the prosecutions. . . ." *See e.g., Ivy v. Katzenbach*, 351 F.2d 32 (7th Cir. 1965).

16. The others were *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

First, the Court stressed that, as in all situations involving the interplay of federal-state relations, the notion of comity, *i.e.*, a proper respect for state functions, was a valid consideration. As was said, however, adherence to notions of comity did not mean

> . . . blind deference to 'States' rights' any more than it means centralization of control over every important issue in our National Government and its courts. • • • What the concept does represent is a system in which . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. 401 U.S. at 44.

With this consideration in mind, the Court then went on to define the instances when a federal court could interfere with pending state criminal proceedings.

The Court first held that the facial invalidity of the statute under which a state criminal prosecution had been instituted no longer provided a basis alone for federal intervention. The Court also held that the mere allegation of a chilling effect because of the alleged facial invalidity, even if true, would not of itself constitute irreparable injury so as to entitle the federal plaintiff to federal equitable relief. The Court instructed that generally irreparable injury would not be found if the threat to federally protected rights could be protected by the defense against a single criminal prosecution,[17] *i.e.*, the state court could afford an adequate remedy at law. Thus, generally, only in cases of "exceptional circumstances"[18] would a court grant federal injunctive relief. "Exceptional circumstances" did not mean a good-faith prosecution brought

17. 401 U.S. at 46.
18. 401 U.S. at 46-48.

under a statute perhaps facially invalid. Rather, it meant illegal seizures, arrests and threats of prosecution merely to harass plaintiffs and discourage them from asserting constitutional rights;[19] in other words, those very circumstances that had been evident in *Dombrowski*.[20] The possibility of a chilling effect, by itself, would not be enough. Circumstances would have to exist, as in *Dombrowski*, to show that there was bad faith by the prosecutorial authorities in the enforcement of the law. In short, the good faith attempt to enforce a questionable statute would not warrant intervention.

In this formulation the Court was thus setting forth those "exceptional circumstances" that could suffice to prove the irreparable injury necessary to support federal intervention in the ordinary case. In terms of comity, if the plaintiff could show an illegitimate activity of the state, then it could not be said that the federal court was unduly interfering with any legitimate state function. As Justice Stewart pointed out:

> . . . if there has been . . . official lawlessness . . . the reasons of policy for deferring to state adjudication are out weighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights. 401 U.S. at 56 (Stewart, J. concurring).

Lastly, the *Younger* opinion pointed out that its dictates were by no means a complete last word on the situations in which a federal court could interfere in a state criminal proceeding. It observed that there could be "extraordinary circumstances in which the necessary ir-

19. 401 U.S. at 48.
20. *Ibid.*

reparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."[21] The Court then cited *Watson v. Buck,* 313 U.S. 387, 407 (1941) as an example for such extraordinary circumstances, at least within the area of statutory challenge.[22]

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Court recognized that even this situation could not be the last word, since it gave guidance only in the statutory area. It said, "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be."[23] This theme was reiterated in *Perez v. Ledesma,* 401 U.S. 82 (1971), a companion case in which the federal plaintiffs sought relief by way of declaratory judgment and injunction against their state prosecutions under state obscenity statutes. Neither bad faith nor harassment had been alleged. Further, the challenge was only to the facial validity of the statute. Reaffirming its holding in the companion cases, the Court found that federal interference had been unwarranted. "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction," was relief warranted. Again, this was not the last word:

> [P]erhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive

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21. *Id.* at 53. In other words, bad faith and harassment is one form of irreparable injury, but only one form. Irreparable injury could be established through other facts.

22. *Id.* at 53-54.

23. *Ibid.*

> relief against pending state prosecutions appropriate. 401 U.S. at 85.

The above analysis, it is submitted, demonstrates that *Younger* and its companion cases sought by no means to serve as the absolute last word on the law of federal injunctions against state criminal prosecutions, or to foreclose further development of the law in this area. These cases, all arising in the First Amendment area, and all involving challenges to the statutes under which the federal plaintiffs were being prosecuted in the state courts,[24] must be read in the specific factual context in which they arose. They sought to clarify the existing law in that area, particularly that arising after *Dombrowski*. Thus, in the First Amendment area, only in "exceptional circumstances," where bad faith and harassment could show the necessary irreparable injury, would a federal court be allowed to step in. Obviously, there could be other situations, exclusive of the First Amendment area, involving other important Constitutional rights—in other words of *Younger*, "unusual" or "extraordinary"—that could also warrant federal intervention, if irreparable injury could also be shown. Simply put, *Younger* arising as it did in the area of freedom of expression, could not be a foreclosure of a resort to the federal court to protect all the other rights guaranteed by the Constitution and Bill of Rights.[25]

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24. *Younger v. Harris* (challenge to State statute under which the defendant was being prosecuted); *Perez v. Ledesma* (declaratory judgment against state statute and injunctive relief against its enforcement sought); *Boyle v. Landry* (challenge to constitutionality of statute); *Dyson v. Stein* (indicted defendant challenged statute); *Samuels v. Mackell* (indicted defendants seek declaration of unconstitutionality of statute under which they were prosecuted); *Byrne v. Karalexis* (challenge to statute on constitutional grounds after indictment).

25. This was the conclusion of the commentators writing soon after the *Younger* opinions issued. *See, e.g., Sedler, Dombrowski In the Wake of Younger, The View From Without and Within*, 1972 *Wisc. L. Rev.* 1, 13-26 (1972), *Note*, 85 *Har. L. Rev.* at 303 (1971).

That being so, in what other situations would the federal court intervene? The *Younger* opinion itself, as well as statements in later cases, give guidance.

First, *Younger* cited *Watson v. Buck, supra,* as an example of an extraordinary situation.[26] Here, the Court speaks in terms of a flagrantly unconstitutional statute, one that could never be constitutionally applied. The first criterion thus arises: flagrant unconstitutionality. Later cases give further guidance. In *Allee v. Medrano,* — U.S. —, 94 S. Ct. 2191 (1974) appellee union committee and individual appellees, who had attempted to unionize farm workers, were subject to persistent harassment and violence by appellants, who were Texas Rangers, members of a sheriff's department and a justice of the peace. Appellees brought a federal civil rights action attacking the constitutionality of certain Texas statutes and alleging that the appellants and others had conspired to deprive appellees of their First and Fourteenth Amendment rights. A three-judge district court declared some of the statutes unconstitutional and enjoined their enforcement and permanently enjoined appellants and other from intimidating appellees in their organizational efforts.

This Court affirmed that portion of the district court's decree that had enjoined the illegal police conduct.[27] *Cf., Lewis v. Kugler,* 446 F.2d 1343 (3d Cir. 1971). It recognized that federal courts "have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied."[28] Where as in this case, there was persistent police misconduct, the Court found injunctive relief appropriate.[29]

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26. 401 U.S. at 53-54.
27. 94 S. Ct. at 2201.
28. *Id.* at 2200, quoting from *Cameron v. Johnson,* 390 U.S. 611, 620 (1968).
29. *Ibid.*

Chief Justice Burger filed a lengthy opinion, concurring in part and dissenting in part from the opinion of the Court. First, he recognized that under *Younger* a federal plaintiff must prove irreparable injury, which he felt must include "except in extremely rare cases," bad faith and harassment.[30] He cited with approval the language of *Perez v. Ledesma, supra,* which recognized that "extraordinary circumstances" was a separate category for federal intervention as long as irreparable injury could be shown.[31] He then postulated his theory of the circumstances under which resort to federal intervention could be supported.[32]

Basically, Justice Burger spoke of a "breakdown of the state judicial system. . . ."[33] That is what had happened in *Dombrowski.*

> The courts had lost control of a prosecutor embarked on an alleged campaign of harassment of appellants, designed to discourage the exercise of their constitutional rights. Under such circumstances, federal intervention would be authorized. 94 S. Ct. at 2210.

In such a situation, in his opinion, the individual is "deprived of meaningful access to the state courts . . . .,"[34] and thus suffers the irreparable injury necessary to support intervention. Furthermore, he is being deprived of an adequate remedy at law by way of a defense in the state court because of the inability of that forum to adequately protect the constitutional rights involved.

Indeed, Justice Burger was speaking of the ordinary case when speaking of the "breakdown of the state judicial

30. 94 S. Ct. at 2209. In this statement he affirms the thesis of this brief that irreparable injury need not always be "bad faith and harassment." Other forms of irreparable injury could be made out.

31. *Id.* at 2210.

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*

system . . . ," the case where certain prosecutorial officials alone were engaged in the misconduct. *Cf., Dombrowski v. Pfister, supra.* Taking this as the norm, the "extraordinary" case could be one where the state judiciary itself was involved in the repression of constitutional rights. Here, there could be no question that the only meaningful forum would be the federal court. *Cf., Perez v. Ledesma,* 401 U.S. 82, 84-85 (1971). While a state court "is presumed to be capable of fulfilling its 'solemn responsibility' . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,"[35] the presumption dissolves when it is alleged that the state judiciary itself is involved.[36]

In *Fenner v. Boykin,* 271 U.S. 240, 244 (1926) it was said,

> The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that course would not afford *full* protection (emphasis added).

"Full protection" must mean an ability to present the defense, and all constitutional claims, to a fair and unbiased judiciary. *See, In re Murchison,* 349 U.S. 133, 136 (1955); *Toomey v. Ohio,* 273 U.S. 510 (1927). Thus, "extraordinary circumstances" could, and should encompass this type of situation.[37] This argument gains force when it is remembered that a predicate of *Younger v. Harris* was an assumption that a defense to the state prosecution would provide an adequate remedy at law for the vindication of the particular constitutional rights involved.[38]

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35. *Ibid.*

36. Federal officials have even been subject to injunction. *See, e.g., Wolff v. Selective Serv. Local Bd. No. 16,* 372 F.2d 817 (2d Cir. 1969).

37. As was said in *Hobbs v. Thompson,* 448 F.2d 456, 465 (5th Cir. 1971), "The opinion [in *Younger*] does not purport to require across-the-board abdication of federal decision-making power in all manner of cases."

38. *Helfant v. Kugler, supra,* 500 F.2d at 1193.

In conclusion, in light of the language of *Younger* itself, and its interpretation by subsequent cases[39] and commentators,[40] there can be no doubt that "extraordinary circumstances" does constitute a separate exception to the *Younger v. Harris* interdiction.

As will be discussed below, petitioner has come to the federal court seeking vindication of substantial constitutional rights, alleged to have been violated by six of seven New Jersey Supreme Court Justices. As petitioner will show below, the court, and especially the Chief Justice, exert tremendous power over the lower state judiciary and bar. As will be shown below, both the executive and judiciary engaged in conduct calculated to subvert petitioner's constitutional rights, which was successful, causing him great irreparable injury. As will be shown below, "extraordinary circumstances" exist in this case and warrant a federal injunction.

Point II

The facts of the present case, involving the deprivation of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the collusion of the State Supreme Court and deputy attorney general present "extraordinary circumstances" under *Younger v. Harris.*

As was recognized by the majority opinion below, the New Jersey Supreme Court is not only the highest court in the State, but "is charged with the responsibility for the

39. *See also, Steffel v. Thompson*, 415 U.S. 452 (1974); *Mitchum v. Foster*, 407 U.S. 225, 230 (1972); *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972).

40. *Carey, Federal Court Intervention in State Criminal Proceedings*, 56 *Mass L. Quar.*, 11, 22 (1971); *Note, Protecting Civil Liberties Through Federal Court Intervention In State Criminal Matters*, 59 *Calif. L. Rev.* 1549, 1565-66 (1971).

overall performance of the judicial branch." *Helfant v. Kugler,* 500 F.2d 1188, 1193 (3d Cir. 1974), quoting from *In re Mattera,* 34 N.J. 259, 272, 168 A.2d 38, 45 (1961).

The court has the power to make rules governing the lower New Jersey Courts and to enforce them. *Id.* In fact, the New Jersey Constitution,[41] Statutory law,[42] and Rules of Court,[43] confer the broadest administrative power on the court over the bench and bar.

> "The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. *Lichter v. County of Monmouth,* 114 N.J. Super. 343, 349, 276 A.2d 382, 385-86 (App. Div. 1971).

The New Jersey Constitution provides that the Chief Justice of the Supreme Court is the "administrative head of all of the courts in the State." *Article* VI, §7, ¶1. This imbues the Chief Justice with the power to:

> ". . . assign judges of the Superior Court to the Divisions and parts of the Superior Court, and . . . from time to time transfer judges from one assignment to another . . ." *N.J. Const.,* Art. VI, §7, ¶2.

It is clear that the New Jersey Supreme Court is much more than an appellate court. It is the overseer of the bench and bar in the State and is vested with formidable supervisory and administrative power over both.

It was this court that ordered the Administrative Director of the New Jersey Courts to telephone petitioner-Helfant on November 6, 1972 and inform him that he was to appear before the New Jersey Supreme Court, in private

41. *N.J. Const.,* Art. VI, §2, ¶1-3 (1947).
42. *N.J.S.A.* 2A:1B-2 through 9.
43. *N.J. Court Rules,* 1:20-1, *et seq.*

session, on November 8, 1972 at ten minutes before ten o'clock in the morning. Helfant was ordered to appear notwithstanding his admonition to the Director that he had been subpoenaed to appear before the State Grand Jury at 10:00 A.M. on the same date. In fact, the Administrative Director replied that he was well aware of that fact, but would not tell Helfant the reason for the meeting although asked to do so. It was this court that further instructed the Administrative Director to obtain a report from respondent, Joseph A. Hayden, Jr., the Deputy Attorney General that had been handling the Grand Jury matter involving Helfant, and which ordered him to deliver "all relevant grand jury testimony."[44] In fact, respondent-Hayden delivered this material to the court before Helfant entered the Chambers and was confronted by the court sitting in its robes.

The court then began to interrogate Helfant using the information contained in the raw grand jury minutes. The Chief Justice immediately inquired of him whether he thought a judge should invoke the Fifth Amendment. Justice Sullivan then asked what the petitioner's feelings were about a judge sitting in judgment of others while he himself was invoking the Fifth Amendment before a grand jury. Justice Sullivan also asked Helfant if he had sat as a judge since invoking the Fifth Amendment.

The Chief Justice then immediately resumed the questioning, asking Helfant about incidents that hed been brought before the State Grand Jury and had not yet been

44. The quoted material is taken directly from the respondent's petition for certiorari, No. 74-80, at page 13. This is a startling admission by the respondents that the New Jersey Supreme Court had ordered the Administrative Director to produce for it raw grand jury testimony, arising out of the case in which Helfant was a target of the Grand Jury and which, conceivably could be presented to the court on appeal. As the State further admits, "the material was obtained and it revealed in substance the allegations against Judge Helfant. . . ."

made public. The Chief Justice cut off discussion about the merits of the criminal matter when Helfant tried to explain why he had previously resorted to the Fifth Amendment. Finally, the Chief Justice directed a last question to Helfant, in a tone of voice that clearly indicated that the question was directly aimed at Helfant's imminent grand jury appearance, "What do you intend to do today?"

It is out of this factual context that Helfant has alleged violations of his Fifth, Sixth and Fourteenth Amendment rights. To adequately fathom the magnitude of these violations certain basic considerations should be examined regarding the Fourteenth Amendment due process and equal protection considerations. It was long ago settled that the prohibitions of the Fourteenth Amendment were directed to the States, and were, to a degree, restrictions upon small power. *Ex parte Virginia*, 100 U.S. 339, 346 (1880); *Hunter v. Wood*, 209 U.S. 205 (1908). The Amendment empowered Congress to enforce the provisions "against State action, however put forth, whether that action be executive, legislative or judicial."[45] Thus, no agency of the State, or officer or agent of the State could deny to any person within its jurisdiction those rights guaranteed by the Amendment.[46]

> ". . . legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it realized that State officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

The concept of due process of law, found in the Fourteenth Amendment did not originate in the American sys-

45. *Ex parte Virginia, supra*, 100 U.S. 346.
46. *Id.* at 347.

tem of Constitutional Law, but was contained in the Magna Charta, as a part of the ancient English liberties. *See generally,* 16 *Am. Jur.* 2d *Constitutional Law,* §543 (1964). Basically, due process "has to do . . . with the denial of that 'fundamental fairness, shocking to the universal sense of justice.' It deals with neither power nor jurisdiction but with their exercise." *Kinsella v. United States,* 361 U.S. 234, 246 (1960). The Due Process Clause restrains those arbitrary and unreasonable exertions of power by the States which are not really within the lawful State power, since they are so unreasonable and unjust as to impair and destroy fundamental rights. *American Land Co. v. Zeiss,* 219 U.S. 47 (1911).

While due process itself is an illusive concept, the exact boundaries of which are undefinable, *Hannah v. Larche,* 363 U.S. 420, 442 (1960), there can be no doubt that the concept of due process has evolved and expanded over the years. *E.g., Grannis v. Ordean,* 234 U.S. 385, 394 (1914); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Morrissey v. Brewer,* 408 U.S. 471 (1972). Perhaps the best statement regarding the relationship between the Due Process Clause and state criminal law is found in *Rochin v. California,* 342 U.S. 165, 168-69 (1952).

> Broadly speaking, crimes in the United States are what the laws of the individual states make them, subject to the limitations of Art. I, §10, cl. 1 in the original Constitution, prohibiting bills of attainder and *ex post facto* laws, and the Thirteenth and Fourteenth Amendments.
>
> These limitations, in the main, concern not restrictions upon the powers of the States to define crime . . . but restrictions upon the *manner* in which the States may *enforce* their penal codes. " • • • Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of

> judgment upon the whole course of the proceedings [resulting in the conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even for those charged with the most heinous offenses. • • • Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Commonwealth of Massachusetts*, 391 U.S. 97, 105 [1934] . . . or are 'implicit in the concept of ordered liberty.' *Palko v. State of Connecticut*, 302 U.S. 319, 325 [1937] . . . ."

As the Court went on to say:

> In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on the balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society. *Id.* at 172.

In the present case, Helfant, an attorney and municipal court judge, was called before the State Supreme Court. Was this procedure in conformance with due process? Or, in other words, was Helfant due any process if the Court wished to conduct a possible removal or disbarment proceeding? *See, Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The answer may be found in New Jersey's own Statutes and Court Rules.

Distinct statutory procedures and rules govern the exercise by the New Jersey Supreme Court of its power to remove judges or to discipline members of the bar. Under *N.J.S.A.* 2A:1B-3, a proceeding for the removal of a judge

may be instituted by either house of the legislature, the governor, by the filing of a complaint, or "by the Supreme Court on its own motion." Full due process rights and protections are afforded a judge during these proceedings. *See, N.J.S.A.* 2A:1B-3 through 10. And, the judge may be removed only if the Supreme Court "finds beyond a reasonable doubt that there is cause for removal. . . ." *N.J.S.A.* 2A:1B-9.

Similar protections are afforded to the lawyer facing disciplinary proceedings. *New Jersey Rules Governing the Courts,* 1:20-1 *et seq.* If a disciplinary committee receives a complaint, or is directed by the Supreme Court to investigate a member of the bar[47] it prepares a statement of charges.[48] A complaint is then issued and served,[49] and a preliminary investigation made.[50] The committee then either dismisses the complaint, or, if it finds unethical or unprofessional conduct, prepares a presentment which it files with the New Jersey Supreme Court.[51] That Court then determines whether it shall issue an order to show cause why the attorney should not be "disbarred or otherwise disciplined."[52] A hearing is held in the Supreme Court on the order. It is important to note that all records, files and meetings are confidential, *R.* 1.20-3(b), and all briefs, papers and exhibits submitted to the Supreme Court are impounded by the Clerk, *R.* 1:20-8. Indeed, in disciplinary proceedings, as in removal proceedings, full due process rights are afforded.[53]

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47. *Rule* 1:20-2(b).
48. *Id.*
49. *R.* 1:20-4(b).
50. *R.* 1:20-4(c).
51. *R.* 1:20-4(h)
52. *R.* 1:20-4(i); *R.* 1:20-8.
53. The protections afforded by the Rules were recognized in *DeVita v. Sills,* 422 F.2d 1172 (3d Cir. 1970) and thus the United States Court of Appeals for the Third Circuit upheld these Rules.

An examination of the record herein indicates that the petitioner was never afforded any of these protective procedures. He was ordered by the Administrative Director of the New Jersey Courts to appear in Chambers *ten minutes* before a grand jury appearance. The Administrative Director called Helfant personally, notwithstanding his knowledge of Helfant's representation by counsel. Further, he did not tell Helfant any reasons for the meeting. The New Jersey Supreme Court requested and received from Deputy Attorney General Hayden the minutes of the grand jury and all matters currently in the file regarding the Helfant matter. Once inside Chambers, Helfant was questioned by the Chief Justice and other Justices about his intention regarding the Fifth Amendment ten minutes before his grand jury appearance. He was further questioned by the Chief Justice about matters being considered by the Grand Jury before which Helfant was to appear. Moreover, Helfant's co-defendant, Samuel Moore, was also called before the Supreme Court immediately after Helfant. He brought with him the complaint which constituted the State's *prima facie* exhibit against Helfant. The Chief Justice discussed the complaint and Helfant's signature and other matters then being presented before the grand jury.[54]

Thus, the record indicates that the New Jersey Supreme Court completely disregarded those very rules and statutes that were designed to protect the individual and insure procedural regularity and due process of law. *See, DeVita v. Sills*, 422 F.2d 1172 (3d Cir. 1970); *Cf., City of Lawrence v. Civil Aeronautics Bd.*, 343 F.2d 583 (1st Cir. 1965). Thus, it is partly upon these facts that Helfant's due process claim is made out. *See, United States v. Raines*,

54. Thus, the allegations by the State that the merits of the underlying controversy were not discussed are simply not true. The record does not support these allegations, but directly contradicts them. *See* Petition, No. 74-80 at 14-15.

362 U.S. 17 (1960); *Buchalter v. New York*, 319 U.S. 427 (1943).[55]

The respondents have argued that the procedure utilized by the New Jersey Supreme Court here was "recognized and established through state constitutional and statutory law,"[56] and that the Supreme Court's obligation to the bench, bar and public sometimes forced the Supreme Court to act prior to formal indictment.[57] The simple answer, of course, is that there is nothing in the record to support this bald assertion; in fact, this is the first time that this has been raised as a justification! Notwithstanding the State's characterization of the procedure utilized, "both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by a simple label a state chooses to fasten upon its conduct. . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Moreover, even if this were the actual situation, there is nothing in the statutes or rules which allows the court to summarily interrogate a judge or lawyer prior to the institution of formal proceedings and especially ten minutes before a scheduled grand jury appearance. If anything, the due process clause was designed in particular to protect against this type of situation, to protect "the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22

55. In essence, this was an intentional action on the part of a state official to intentionally administer unequally a law fair on its face. This was an unconstitutional selection in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Snowden v. Hughes*, 321 U.S. 1 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, 362-63 (1886). *See also*, *Note*, 59 *Calif. L. Rev.*, *supra*, at 1556.

56. Petition, No. 74-80 at 40.

57. *Id.* at 33.

(1972). Moreover, even though the governmental purpose herein may have been legitimate and substantial it could not be pursued by means that stifled fundamental personal liberties. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 101 (1972). In essence there was not one word of testimony to support the respondents' assertions that the Supreme Court was engaged in any legitimate inquiry. The facts and the record simply belie it.

Moreover, the failure of the New Jersey Supreme Court to abide by established law and its own rules also deprived the petitioner of his right to counsel, mandated by both the New Jersey Court Rules, 1:20-1 *et seq.*, and the Sixth Amendment, *U.S. Const. Amend.* VI, *Cf., Coleman v. Alabama,* 399 U.S. 1 (1970); *Conley v. Dauer,* 463 F.2d 63 (3d Cir. 1972).

Thus, it is seen that the New Jersey Supreme Court was engaged in a constitutionally illegitimate procedure, one designed to force Helfant into foregoing his Fifth Amendment rights. In this context, the proper legal framework of the coercion issue takes shape. While there can be no doubt that lawful investigatory conduct may possess a "compelling atmosphere,"[58] or create a "Hobson's Choice,"[59] for an individual, unlawful or illegitimate conduct renders the product of that conduct illegal, incompetent and inadmissible. *Cf., Miranda v. Arizona,* 384 U.S. 436, 466 (1966). It is the procedure causing the compulsion which must be examined to determine if there has been a denial of due process of law. *Cf., Rochin v. California, supra.* In other words, if a defendant signed a sworn confession exacted from him in violation of *Miranda,* there could be no question that he could not be prosecuted for perjury, should the confession prove to be false.

58. *Miranda v. Arizona,* 384 U.S. 436, 466 (1966).
59. *Id.*

This argument gains more force when the rationale behind the Fifth Amendment is examined. It is clear today that the purpose of the Fifth Amendment is to deter illegal governmental action. *See, e.g., Michigan v. Tucker,* — U.S. —, 94 S. Ct. 2537 (1974); *Jackson v. Denno,* 378 U.S. 368 (1969); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Culombe v. Connecticut,* 367 U.S. 568 (1961). The product of illegal governmental action may indeed have great relevance to crucial issues of guilt or innocence, but this is not the focus of the inquiry. The focus is upon the governmental action. It is the prophylactic nature of the rule which serves to vindicate the due process rights. *See, Chaffin v. Stynchcombe,* — U.S. —, 93 S. Ct. 1977, 1982 (1973); *Colten v. Kentucky,* 407 U.S. 104 (1972); *Moon v. Maryland,* 398 U.S. 319 (1970); *North Carolina v. Pearce,* 395 U.S. 711 (1969).

Here, the Supreme Court illegally interrogated Helfant, summoning him to its Chambers when it had absolutely no right to do so, ten minutes before a grand jury appearance of which it knew. Anything exacted from him as a result of this confrontation was illegal, in violation of Helfant's due process rights. With this analysis in mind, there can be no doubt that Helfant has suffered, and continues to suffer, irreparable constitutional harm which is both great and immediate.[60]

Moreover, the magnitude of the due process violation increases if one examines the entire factual pattern alleged in the complaint. Prior to Helfant's testimony, three convicted felons, John Cantoni, Sheldon Kravitz and Abraham

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60. The procedural due process violation was probably best articulated by Mr. Justice Jackson in his dissenting opinion in *Shaughnessy v. United States,* 346 U.S. 206, 224 (1953) (Jackson, J., dissenting):

> "Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. • • • Procedural fairness and regularity are of the indispensible essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

Schusterman testified in the grand jury under a grant of immunity. They were all summoned there by respondent, Deputy Attorney General Hayden, and testified pursuant to promises of concessions and recommendations of leniency by the State. Thus, the testimony before the grand jury had been structured, or in other words, "set up," prior to November 8, 1972, the date of Helfant's second appearance. Previously, Helfant had resorted to the Fifth Amendment and had every intention to do so on this date. This fact was known to the Supreme Court, because the State has now admitted for the first time that the grand jury minutes were turned over to the court prior to Helfant's entrance into Chambers on November 8, 1972. Similarly, the court must have also known of the testimony of Cantoni, Kravitz and Schusterman. When Helfant was called into Chambers, he was immediately confronted with questions about his resort to the Fifth Amendment and was asked upon leaving by the Chief Justice, "What do you intend to do today?" Helfant, fearful and overwrought, conceiving that his livelihood was at stake, testified before a grand jury that had been structured to indict him for some offense if he testified.[61]

Helfant's case is factually quite similar to two cases arising in the lower Federal Courts, *United States v. Mandujano*, 496 F.2d 1050 (5th Cir. 1974) and *United States v. Rangel*, 496 F.2d 1059 (5th Cir. 1974). The analysis in those cases serves as a guide to the decision here. In *Mandujano*, the defendant had appeared before a grand jury investigating alleged narcotics violations. The United States Attorney had received a report from a narcotics agent

61. "Since *Chambers v. Florida*, 309 U.S. 227, . . . [the Supreme] Court has recognized that coercion can be mental as well as physical . . . ." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

"When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts v. Indiana*, 338 U.S. 49, 53 (1949). The decision must be freely as well as rationally made. *Blackburn v. Alabama, supra*, 361 U.S. at 208.

that he had previously attempted to offer defendant money for the purchase of heroin. The United States Attorney had questioned the agent of the circumstances of this attempted buy in preparation for defendant's appearance before the grand jury. When defendant appeared to testify, the agent had preceded him, detailing the circumstances of the attempted buy. The government attorney questioned the defendant, tracking the exact facts of his actual contact with the Federal narcotics agent. The defendant was subsequently indicted for perjury, the perjury based upon the defendant's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The defendant then moved to suppress his testimony before the grand jury. The district court granted the motion expressing itself in words quite appropriate to the present case:

> Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment • • • If the defendants admitted that they had offer [*sic*] to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. • • • The denial of the defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. *Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them. United States v. Mandujano*, 365 F. Supp. 155 158-59 (W.D. Tex. 1973) (emphasis added).

The United States Court of Appeals for the Fifth Circuit affirmed.[62] It first recognized that there was no basis for the perjury indictment prior to the defendant's testi-

62. *United States v. Mandujano*, 496 F.2d 1050, 1059 (5th Cir. 1974).

mony. If the government attorney actually anticipated the answers, the court found, he must have known that the responses would require the defendant to either confess to a crime or commit perjury. The inference was that the questioning was primarily aimed at baiting the defendant to commit perjury; thus, the only "safe harbor" for the defendant was to keep silent, a right of which the government failed to adequately inform him. Although the court recognized that *Glickstein v. United States*, 222 U.S. 139 (1952) and other cases held that the Fifth Amendment did not allow a person to commit perjury, it distinguished these cases on several important factors. First, *Glickstein* involved no governmental misconduct.[63] As the court had earlier said, "we simply cannot ignore the unfairness in baiting this defendant before the grand jury. . . ."[64] The court simply could not "overlook the principle that the Fifth Amendment must always be as broad as the mischief against which it stands."[65] Thus, as a deterrent to any future prosecutorial misconduct the court ordered suppression of the testimony.

More importantly, the court held that the:

> Entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the *pale of permissable prosecutorial conduct*. We conclude that the entire proceeding was a violation of Mandujano's due process rights . . . (emphasis in original).[66]

As the court concluded, an asserted denial of due process is tested by the totality of the facts of the given case. Here, the conduct was so "offensive to the common

63. *Id.* at 1058.
64. *Id.* at 1056.
65. *Ibid.*
66. *Id.* at 1058.

and fundamental ideas of fairness" as to amount to a violation of due process. It thus affirmed.[67]

United States v. Rangel, supra, was a companion case of *Mandujano.* Here, defendant was also called before the grand jury, pursuant to a subpoena. He was told by the Assistant United States Attorney conducting the grand jury investigation that anytime he felt an answer would be incriminating he did not have to answer. However, he was warned that he could not refuse to answer a question if the answer would not tend to incriminate him. "In other words you would be in contempt of court."[68] The Court of Appeals found these proceedings even more unfair than those in *Mandujano* because, "not only are all the ingredients of Mandujano's predicament present, but also the warning actually given Rangel contained an implicit threat which all but negated the warning of the privileges against self-incrimination."[69] The court thus concluded that the procedure employed by the government to indict Rangel was a violation of due process.

The present case involving Helfant is far stronger. The testimony against him did not come from a Federal narcotics agent, but from three convicts, then in jail, who were granted immunity for their testimony and promises of recommendations of leniency (which have been carried out). Secondly, the conduct was not limited, as it was in *Mandujano* and *Rangel,* to a prosecutor calling in a pro-

67. See n.62 *supra.* The law of the State of New Jersey is the same. *State v. Redinger,* 64 N.J. 41 (1973). In this case the defendant was sworn and testified to a traffic offense when it was known to the municipal court judge that the police had obtained a sworn statement from two individuals directly contradicting defendant's testimony. Defendant was indicted for perjury and moved to dismiss the indictments. On appeal, the New Jersey Supreme Court held that "fundamental fairness" barred the State from charging the defendant with perjury. As the court said, ". . . the State should have no part in any kind of trickery. What happened at the hearing . . . smacks of entrapment. • • • This was not fair play." 64 N.J. at 50.

68. 496 F.2d at 1060.

69. *Id.* at 1062.

spective defendant, knowing that he had been involved in wrongdoing and would not be in a position to admit it before a grand jury. Here, it was the combined action of judicial lawlessness and prosecutorial misconduct which coerced and frightened the petitioner out of the exercise of his Fifth Amendment rights. While both *Mandujano* and *Rangel* had the ability to seek redress in the courts, and actually did so, where was petitioner to go? As in *Mandujano* and *Rangel*, the proceedings smacked of an attempt to entrap the defendant to either incriminate himself or commit perjury. The proceedings in *Mandujano* and *Rangel* were found to be violative of due process. Certainly, nothing can be more shocking to common notions of fairness than judicial-executive collusion. There can be no doubt that Helfant has suffered, and continues to suffer, a massive violation of his due process rights.[70]

Because Helfant has only been indicted and not convicted of any crime, and because the Fifth Amendment coercion issue arises in a due process context, his situation must be set apart from those cases earlier cited by the respondents for the proposition that the Fifth Amendment does not protect against perjury. *E.g., United States v. Knox*, 396 U.S. 77 (1969); *Bryson v. United States*, 396 U.S. 64 (1969); *United States v. Kahringer*, 345 U.S. 22 (1952). In each of these cases, the defendant had been

70. Thus, under this analysis, the respondents cannot legally or analytically distinguish, under *Mandujano*, the false swearing counts of the State indictment from the substantive counts. The due process violation permeates both. More important, this case comes to the Court, not after a conviction for false swearing, but only after an indictment. No one has proved Helfant lied, and in fact, the inference can be just as strong that the three convicts lied. There was certainly a motivation to do so. An indictment is only an accusation, it does not reflect on guilt or innocence.

Moreover, part of the harm is in the fact Helfant testified. Perhaps it was his testimony that proved the deciding factor in the minds of a number of grand jurors that caused them to vote for an indictment on all the counts. Intangibles are certainly involved, not merely legal analysis. It is not beyond conjecture to say that had Helfant not testified, the grand jurors might have disbelieved the entire testimony of the three convicted felons.

convicted beyond a reasonable doubt for perjury and sought to overturn the conviction on the ground that the government had illegally exacted the incriminating statement. Moreover, in each case, at the time the alleged perjury was committed, the government had a lawful right to exact the information it sought. It was neither engaging in judicial lawlessness, prosecutorial misconduct, nor entrapment. In other words, elemental due process violations were not implicated in the proceedings leading up to the incrimination.

In the present case, Helfant was actually "set up" by the collusion between Deputy Attorney General Hayden and the New Jersey Supreme Court. The three convicts had already testified. Thus, if Helfant did testify, he could either agree with them, implicating himself in an alleged criminal scheme, or disagree, setting himself up for the false swearing charges. His intention was to take the Fifth Amendment, thus avoiding any testimony whatsoever. The Supreme Court, however, brought Helfant into Chambers ten minutes before his appearance and coerced him into testifying, removing the only "safe harbor" open to him, *i.e.*, to remain silent. This misconduct plainly distinguishes the Helfant situation from those in the above cited cases. It is the type of conduct that the Fifth Amendment was designed to deter.

More on point are those decisions such as *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Raines v. United States*, 390 U.S. 85 (1968) in which the method by which the defendants were caused to incriminate themselves was legally challenged. Here, Helfant seeks to lawfully challenge the method by which the statements were exacted, prior to any determination of his guilt of any substantive charge.

It must also be remembered that involved in the factual complex is the divulgence of raw grand jury data by Deputy Attorney General Hayden and his collusion with the court. This was in direct violation of the New Jersey Rules mandating secrecy for grand jury proceedings, *R.* 3:6-7, 3:6-8, and of numerous cases. *See, e.g., State v. Clement,* 40 N.J. 139 (1963); *United States v. McKeaver,* 271 F.2d 669 (2d Cir. 1959). While a grand jury is an arm of the court, *In re Jeck,* 26 N.J. Super. 514, 98 A.2d 319 (App. Div. 1953), it is not a tool of either prosecutor or judge. The Rules provide for the secrecy of the grand jury testimony; no Rule provides for its divulgence to the Supreme Court during an ongoing investigation. Such divulgence would be an unlawful use of the grand jury to violate a defendant's constitutional rights. *See, Branzburg v. Hayes,* 408 U.S. 664 (1972); *United States v. Bryan,* 339 U.S. 323 (1950); *Blackmer v. United States,* 284 U.S. 421 (1932).[71]

The action of the Deputy Attorney General was plainly misconduct. In New Jersey, misconduct by the prosecutor or the grand jury itself is grounds for dismissal of the indictment. *State v. Grundy,* 136 N.J.L. 96 (Sup. Ct. 1947); *State v. Garrison,* 130 N.J.L. 350 (Sup. Ct. 1943); *State v. Borg,* 9 N.J. Misc. 59 A. 788 (Sup. Ct. 1931); *State v. Donovan,* 129 N.J.L. 470 (1943); *State v. Dayton,* 23 N.J.L. 49 (Sup. Ct. 1850). The Deputy Attorney General, upon being requested to divulge the grand jury minutes should have immediately refused. He had an absolute duty to do so.

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71. To accept respondents' position that because a grand jury is an arm of the court, the court is thus allowed to examine raw grand jury matters, is like saying the court may take money *in custodia legis* and use it to go on vacation. Or, it is like saying that because the petit jury is an arm of the court, the court may sit in on its deliberations!

Furthermore, this action by the Deputy Attorney General under the cases, was in itself a violation of Helfant's due process rights. In *Chessman v. Teets*, 350 U.S. 3 (1955), the defendant applied to the Federal District Court for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court had been heard upon a fraudulently prepared transcript of the trial proceedings. He alleged that the prosecuting attorney and the court reporter had, by corrupt agreement, prepared the fraudulent transcript. On the record before the United States Supreme Court there was no denial of petitioner's allegations. Therefore, it was held that the charges of fraud, as such, set forth a denial of due process of law in violation of the Fourteenth Amendment. In *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1925), the petitioner charged a violation of due process in the knowing use by the prosecution of perjured testimony and the deliberate suppression by the prosecution of evidence which would have impeached or refuted the testimony. The State argued that this did not raise a Federal question. In answer, the Court said:

> "That requirement [of due process], in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. • • • It is a requirement that cannot be deemed to be satisfied . . . if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with

> the rudimentary demands of justice as is the obtaining of a like result by intimidation."[72]

It is seen then that the due process violation came from two fronts, the Supreme Court and the Deputy Attorney General. Each action separately was a violation of due process; collectively they represented a massive violation of petitioner's constitutional rights. Moreover, there was not only a violation of Helfant's due process rights, but also a violation of the doctrine of separation of powers embodied in the Federal and New Jersey Constitutions. *N.J. Const. Art.* III, §1 (1947).

An examination of the complaint thus reveals much more than an allegation of coercion. It reveals a violation of the petitioner's Sixth Amendment right to counsel and massive violations of his due process rights under the Fourteenth Amendment. Moreover, it alleges constitutional harm that has already taken place, not that merely threatened. The structure of the New Jersey court system, in imbuing the Chief Justice and Supreme Court with tremendous power over bench and bar, supports the allegation of the possibility that the "brooding omnipresence" of the New Jersey Supreme Court could affect a trial judge seeking to make a determination of the voluntariness issue. *See, Helfant v. Kugler, supra,* 500 F.2d at 1197.[73]

Furthermore, if Helfant lost the voluntariness issue in the trial court, his ultimate appeal would necessarily have to be to the very court alleged to have collusively

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72. *Cf., Brady v. Maryland,* 373 U.S. 83 (1963).

73. As the Third Circuit opinion recognized, this factual determination would have to be made by a State Judge, "subject to the 'absolute and unqualified' administrative power of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself." *Id.* at 1194. On the basis of the record in this case, it is respectfully submitted that it cannot be said that the opinion below erred in its determination that "extraordinary circumstances" existed.

engaged in the coercion. As both the *en banc* decision, *Helfant v. Kugler, supra,* 500 F.2d at 1193, and the decision of the three-judge court recognized, the predicate of *Younger v. Harris* was an assumption that the defense of the pending State prosecution would afford an adequate remedy at law for the vindication of the Federal constitutional rights at issue. As they further recognized, exceptional circumstances "must include circumstances reflecting upon the likelihood that the State forum will afford an adequate remedy at law . . . ." *Ibid.* As was said in *Fenner v. Boykin,* 271 U.S. 240, 244 (1926), "The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that course would not afford full protection."[74] And, it has been established beyond doubt that an adequate remedy at law includes the ability not only to have a proper trial in the state trial court, but also the ability to resort to full state appellate processes. *Douglas v. City of Jeannette,* 319 U.S. 157, 164 (1943).[75] Obviously, any resort to the New Jersey court system, as a matter of law, would not afford "full protection." Thus, if the circumstances here alleged do not fall within the category of extraordinary circumstances, none do.

Based upon the present record there are ample facts to justify, at the least, federal intervention for the purposes of fact-finding. *See, Conover v. Montemuro,* 477 F.2d 1073 (3d Cir. 1973). It is respectfully submitted, how-

74. The New Jersey Courts have rejected all of petitioner's efforts to quash the indictment on the grounds that it was based on coerced testimony. Plainly, the state courts have not afforded him a remedy at law. Moreover, Helfant sought state relief up to and including that of the New Jersey Supreme Court. That court denied his application in an order over the signature of the respondent, Chief Justice (App. 42-59).

75. As one commentator has noted federal court intervention is warranted when the "federal court is able to provide a form of relief necessary to protect the petitioner's rights that a state criminal court is legally powerless to grant." *Note,* 59 *Calif. L. Rev. supra,* at 1552.

ever, that the opinion below did not go far enough. As has been demonstrated, the massive violations of due process, the extraordinary circumstances under which this case arises, call for massive Federal intervention. It must be greatly questioned whether a Federal adjudication on the collusion issue would be enough to cleanse the state processes of the taint that has been spread upon them by the actions of the New Jersey Supreme Court and the Deputy Attorney General. Every state official is bound by the Fourteenth Amendment. *United States v. Raines*, 362 U.S. 17 (1960). And due process protects against any arbitrary action of any state tribunal. *Washington ex rel. Oregon, R.R. and Nav. Co. v. Fairchild*, 244 U.S. 512 (1911). Every tribunal must be fair and impartial and without any interest in the procedure. *Toomey v. Ohio*, 273 U.S. 510 (1927). For, as was said *In re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the possibility of unfairness.

This is exactly what is involved in the present case. The New Jersey Supreme Court exerts great powers. It has injected itself into a prosecution. Can it be said that petitioner can ever vindicate his rights in the courts of this state?

Lastly, it must be emphasized that this is a civil rights case brought under 42 U.S.C. §1983 (1970). Under this section, it is not necessary to show an improper motive on the part of the defendants, *Bennett v. Gravelle*, 320 F. Supp. 203 (D. Md. 1971). Neither is it necessary to show that the wrongful acts complained of were done with a

specific intent to deprive petitioner of a federally protected right, *Baxter v. Birkins*, 314 F. Supp. 222 (D. Colo. 1970). Nor, is it necessary to allege a specific intent to deprive petitioner of a federally protected right in the complaint itself. *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Ca. 1970). Consequently, the question in this case is not whether the respondents actually intended to deprive Helfant of his federal rights, but rather whether, in fact, their actions led to this deprivation.

Respondents have argued that petitioner had already suffered the harm. They further argue that a number of the Justices have left the court and thus Helfant would not be facing those very individuals whom he alleged engaged in the coercion. Thus, they conclude that he has no standing to complain of the conduct. This analysis is both factually incorrect and constitutionally deficient.

First, while it is true that certain Justices have retired, it is also true that others have not and currently sit on the court. Secondly, as a matter of law, the argument ignores basic precepts of constitutional analysis. To accept it would be akin to saying that because the unconstitutional search has already taken place, and the particular officers involved have retired, the defendant could not seek to challenge the eidence on Fourth Amendment grounds! As was said in *United States v. Calandra*, – U.S. –, 94 S. Ct. 613, 619 (1974) the prime purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . . ."

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[76]

76. Quoting from *Elkins v. United States*, 364 U.S. 206, 217 (1960).

It is of no moment that the injury has already taken place because, "the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[77] It is the deterrent effect which is hoped will guarantee the future rights of others through the exercise of the remedy in the particular case.

Furthermore, mootness of an issue, for injunction purposes, does not arise merely because the complained-of activity has ceased. There is no requirement that the victim be continually subjected to unlawful restrictions upon his liberty throughout the pendency of an action in order to preserve it as a live controversy.[78] If there is the mere possibility of recurrence, the action remains live, especially in the constitutional sense, since the mere possibility might be enough to create a present and future chilling effect on the exercise of constitutional rights.[79] More importantly, when there is constitutional harm involved, it may be virtually impossible to determine if there was actual harm, or lack of harm. *Cf., Peters v. Kiff*, 407 U.S. 501, 504 (1972). In light of any uncertainty, any doubt should be resolved in favor of the victim, since the unconstitutional action may "cast doubt on the integrity of the whole judicial process."[80] The resolution in favor of the victim thus serves to cleanse the entire system.

Helfant, a lawyer, was subjected to close questioning, on matters directly related to his prior and imminent resort to the Fifth Amendment, by Justices of the highest court in his state. What can have a more coercive effect upon a lawyer than to be subjected to an interrogation by judges, at a time and place foreign from the normal process of the court? It would not be rife to say that veiled

77. *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).
78. *Allee v. Medrano, supra*, — U.S. —, 94 S. Ct. at 2197.
79. See, *SEC v. Medical Commission of Human Rights*, 404 U.S. 403, 406 (1972); *Gray v. Sanders*, 372 U.S. 368, 376 (1963).
80. *Id.* at 502.

threats inhere in such a situation. In the present situation the court had requested and received the raw grand jury minutes that indicated that petitioner had earlier resorted to the Fifth Amendment. *See, Spevack v. Klein*, 385 U.S. 511 (1967). Yet, this Chief Justice had disapproved of *Spevack*. *See, State v. Falco*, 60 N.J. 570, 292 A.2d 93 (1972). The known absolute power of this court over both the bench and bar could only nourish in Helfant a belief that a direct threat to his livelihood existed if he chose to again resort to the Fifth Amendment.

This Court has never hesitated to enjoin state officials from engaging in repressive conduct. It has hesitated to do so, however, when it believed that the State court system could protect the individual. At least, he had a vehicle available to vindicate his rights. But where is he to go when the state judiciary itself is implicated? Thus, conduct which may be considered mild if done by a state sheriff, or even a state prosecutor, becomes heinous if engaged in by the state judiciary. Where is the victim to turn, if not to the federal system? And, what should be the response, if not the most forceful and effective vehicle available for vindicating the rights of the victim and cleansing the system itself. That is what is necessary here, in these most extraordinary circumstances.

Point III

Bad faith on the part of respondents has been demonstrated by their patently unconstitutional conduct.

It has never been conceded, nor is it now conceded, that bad faith was never present in petitioner's State

prosecution.[81] In fact, petitioner alleged bad faith in his complaint:

> The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.S.C.A. §2283.

The court below found that this was not a case of bad faith and thus rejected petitioner's assertion that he was entitled to a federal injunction. *Helfant v. Kugler*, 500 F.2d 1188, 1196 (3d Cir. 1974). This was found notwithstanding the limited record made in the district court and the District Judge's failure to make fact-findings on the issue. It is submitted that the court erred in foreclosing the ability of the district court on remand to explore this issue.[82]

Perez v. Ledesma, 401 U.S. 82, 85 (1971) defined "bad faith" in the *Younger* context as a prosecution brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. Numerous cases, both before and after *Younger*, have shown that the definition found in *Perez* was by no means the last word on what could constitute bad faith on the *part of state officials* which would support federal injunctive intervention in a pending state prosecution.

NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966), was a pre-*Younger* case in which mass arrests had occurred, movement leaders had been detained in temporary

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81. The statement in the dissent in the court below, "that neither bad faith nor harassment are present in Helfant's prosecution" is wrong. *Helfant v. Kugler*, 500 F.2d 1188, 1199 (1974) (Adams, J., dissenting).

82. Although, as was argued above, since this is a case of "extraordinary circumstances" a showing of bad faith is not absolutely necessary to prove irreparable injury for purposes of federal injunctive relief.

jail facilities until each could make an individual bond, and the prosecution had insisted in trying each case separately. Granting affirmative relief, the court found:

> The record discloses a pattern of conduct on the part of the officials of the city . . . that leads us to the conclusion that defendants took advantage of every opportunity, serious or trivial, to break up these demonstrations in protest against racial discrimination, and that a large number of the arrests had no other motive, and some had no justification whatever, either under municipal, State or Federal law. *Id.* at 838.

Similarly, in *Houser v. Hill*, 278 F. Supp. 920 (M.D. Ala. 1968), the court enjoined police officials from from inflicting summary punishment against blacks and arresting them because of the exercise of their constitutional rights. *See also, Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969), *vacated*, 401 U.S. 987 (1971). In *Dombrowski v. Pfister*, 380 U.S. 479 (1965) the court found raids and seizures of materials, lack of probable cause for arrests, public exposure of files illegally seized, and threatened prosecutions.

In all these cases there were *acts* by government officers, other than the bringing of the prosecution itself, that indicted an invidious motive on the part of the officials. Further, the circumstances of each case suggested that as a result of these acts there was a direct chilling effect upon the exercise of constitutional rights as well as the direct violation of those rights by the government officials, *i.e.*, a real and not hypothetical deprivation of constitutional rights. *See, R. Sedler, Dombrowski In the Wake of Younger: The View From Without and Within*, 1972 *Wisc. L. Rev.* 1, 24-25 (1972). What must also be remembered, is that these cases showed, in addi-

tion to illegal arrests and detentions, illegal acts by government officials done *after* the arrests, *i.e.*, the illegal conduct of the officials in the *manner* in which the criminal laws were being enforced. *Cf.*, *Rochin v. California*, 342 U.S. 165, 168 (1952).

Thus, these cases showed that bad faith was not premised upon a showing by the federal suitor of actual subjective intention of an invidious motive by the state officials,[83] but rather a showing of official action from which an inference of bad faith could be presumed.[84] In both *Taylor v. City of Selma*, 327 F. Supp. 1191 (S.D. Ala. 1971) and *Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970), post-*Younger* cases, facts independent of the actual arrests were relied upon by the court to establish bad faith. In *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972), a post-*Younger* case, the court enjoined a single state prosecution holding that an injunction could lie against state prosecutorial authorities if they either fostered or took part in any misconduct. Significantly, the court equated bad faith with the actions of the prosecutorial authorities in a single state prosecution saying:

> When the federal right sought to be protected is the right not to be subjected to a bad faith prosecution . . . the right cannot be vindicated by undergoing the prosecution. *Id.* at 122, n.11.

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83. *Cameron v. Johnson*, 390 U.S. 611 (1968) indicates it would be very difficult indeed to make out a case simply by trying to show improper motive on the part of government officials. *See*, *Sedler*, *supra*, at 29. Common practice has always demonstrated that intention is one of the most difficult facts to prove in any case.

84. For example, proof of selective enforcement of a statute could suffice to establish bad faith since selective enforcement of a valid law is patently unconstitutional. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Selective enforcement would certainly be relevant on the issue of the bad faith of the authorities conducting the prosecution. *See*, *Sedler*, *supra*, at 30.

Shaw demonstrates that bad faith may be shown if state officials either fostered a bad faith prosecution, or then engaged in actions during the pendancy of the prosecution which indicated it had been undertaken in bad faith.

The United States Court of Appeals for the Third Circuit earlier had impliedly accepted this principle in *Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971). Here, plaintiffs sought to enjoin the alleged arbitrary and unreasonable searches of their vehicles by the New Jersey State Police. They claimed that they, and their class, were being singled-out for special treatment because of their long hair. The Court of Appeals affirmed the dismissal of the complaint by the district court, finding that this was the type of case in which plaintiffs' rights would be protected in a defense in state court. The court went on to make the following pertinent statement, however:

> The plaintiffs allege police misconduct, but an injunction against pending state criminal proceedings would operate against the prosecutorial authorities, and there was no allegation that they have either fostered or taken part in any alleged misconduct. *Id.* at 1348.

In other words, if there had been a collusive scheme between the police and prosecutorial authorities to actually single-out plaintiffs the injunction would have properly issued.[85] In *United States ex rel. Birnbaum v. Dolan*, 452 F.2d 1078 (3d Cir. 1971) the Third Circuit again implied that bad faith could be implied from the manner in which a prosecution was conducted, rather than in the reasons for bringing it.

Thus, the basic point is that *Younger v. Harris*, and *Perez v. Ledesma*, did not radically change—if they changed

85. This would have shown knowing selective enforcement of valid statutes. See, n.84, *supra*.

at all—the definition of bad faith. They merely sought to illustrate. As the cases both preceding and following them indicate, they were not the last word on bad faith.[86]

The bad faith in both the inception and handling of petitioner's prosecution is readily demonstrated. It commenced with the imperious command of the Supreme Court for Helfant to appear before it ten minutes before he was to go before the grand jury. It was continued by the structuring and manipulating of the grand jury proceedings by respondent Hayden, in bringing in three convicted felons, and, with promises of leniency, structuring their testimony in such a manner to set up Helfant for an indictment. The bad faith was nourished by Hayden and the court in its requesting raw grand jury minutes and his forwarding of them to the court, in violation of law. It was further nourished by the questioning of Helfant without his counsel present, by the Chief Justice and Justice Sullivan about matters pending before the grand jury, for the purpose of coercing Helfant to forego those Fifth Amendment rights he had so forcefully asserted, through counsel, at his initial appearance before the grand jury. Could the inference of bad faith have been better demonstrated than by the last question that the Chief Justice directed at Helfant, "What do you intend to do today?"

Finally, the factual context was completed when the court questioned Samuel Moore, Helfant's co-defendant, immediately after Helfant left the chambers, using the State's main exhibit as the source for the questions. This by the very court that would ultimately have to consider any appellate claims!

The court below erroneously chose to find no bad faith. It made this finding upon a limited record, when

86. *See, Note,* 59 *Calif L. Rev., supra,* at 1556-57. As Carey has noted, "What conduct falls within this category [of bad faith] remains to be worked out in future cases." Carey, *supra* at 20.

the district court made no fact-findings on the issue. This was a crucial finding because it served as a basis for disqualifying Helfant's claim for injunctive relief. At least, the court should have remanded to the district court for findings on the issue. *Cf., Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2202 (1974). Petitioner asserts that this Court should overturn this finding and allow the full exploration of the issue of bad faith.

Point IV

The present matter should be remanded to the District Court for a full trial and complete findings of fact and conclusions of law.

As has been stated numerous times in this brief, this case comes before this Court after a *R.* 12(b)(6) motion and upon a very limited record. The only testimony taken was that on the return day of petitioner's order to show cause. The witnesses testifying were petitioner-Helfant himself and one of his attorneys, Patrick T. McGahn, Jr. Their testimony was supportive of the allegations in the complaint and established, without contradiction, the facts and circumstances surrounding Helfant's confrontation with the New Jersey Supreme Court on November 8, 1972. Respondents introduced no testimony or any exhibits to refute the material allegations of the complaint and petitioner's testimony.

Furthermore, the court below made no detailed fact-finding on any crucial issue in the case; it could not do so because of the limited nature of the testimony before it. Without binding the matter over for a full trial, it granted respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, with-

out determining in detail whether the prerequisites of *Younger v. Harris* had been met after a full trial. Further, the court made no findings of fact and quite conclusory findings of law on the return day of an order to show cause why a preliminary injunction should not issue. *See, Federal Rules of Civil Procedure,* 65(b). In many respects, the actions of the district court were not in conformance with the established law and practice in the area of preliminary injunctions.

First, the court dismissed petitioner's complaint at the conclusion of the hearing on the preliminary injunction only. The only testimony induced at this hearing was that of petitioner and one of his attorneys. Respondents made no attempt by way of testimony to contravert the material allegations of the complaint or to dispute the facts elicited through the testimony of petitioner and his witness. Counter-affidavits were not introduced. Thus, the proofs indicated that petitioner had been unlawfully called to the Chambers of the New Jersey Supreme Court, unlawfully interrogated by the Supreme Court, and as a result was coerced into foregoing his Fifth Amendment rights. The district court dismissed the complaint at the end of his testimony without ever notifying counsel that the court was consolidating the trial on the merits with the hearing on the restraining order. In *Inmates of Attica Correctional Facility v. Rockefeller,* 453 F.2d 12 (2d Cir. 1971) it was held that if a complaint clearly stated a claim which entitled the plaintiff to some injunctive relief if proved at trial, and the evidence presented was received solely upon plaintiff's application for a preliminary restraint, without the consolidation of this hearing with the trial on the merits, the court erred in denying injunctive relief and in dismissing the complaint insofar as it sought permanent injunctive relief against a violation of plaintiffs' Eighth Amendment rights.

The facts of the present case are similar. Here, petitioner made out a clear civil rights violation in his complaint. He introduced testimony in support of the complaint which was not refuted by respondents. The court had absolutely no basis upon which it could dismiss the entire complaint without dealing with the crucial *Younger v. Harris* issues. It could properly deal with them only after a full trial. *Cf., K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087 (9th Cir. 1972). In *Santiago v. Corporacion de Renovacion Urbane Y. Vivienda de Puerto Rico*, 453 F.2d 795 (3d Cir. 1972) the court held that the dismissal of a civil rights complaint on the basis of findings made upon evidence which was introduced solely in support of an application for a temporary restraining order was error, when it could not be found that notice or warning was given by the court at any time before the decision that it was consolidating the trial upon the merits with the hearing on the restraining order; when the complaint did not fail to state a cause of action; and disputed material factual issues were presented which would preclude summary judgment. That in essence is what happened in the present case.

The district court herein made no fact-finding on the crucial issue of coercion. *See, Helfant v. Kugler*, 500 F.2d 1188 1192 (3d Cir. 1974). *Cf., Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Haynes v. Washington*, 373 U.S. 503, 514 (1963). Neither did the District Court make any fact-findings on the ability of Helfant to vindicate his federal constitutional rights in the court system of New Jersey. It made no fact-findings on "extraordinary conditions," nor on the bad faith of the respondents, notwithstanding a situation in which the inference of bad faith, at least, would arise.

Moreover, the court made no detailed findings of fact on whether petitioner established irreparable harm

through the lack of an adequate remedy at law in the New Jersey court system. This, of course, would be dependent upon a detailed set of facts before the court, which were absent at that time.

A reviewing court cannot even consider the merits of an application for restraints, on appeal, without formal findings of fact and conclusions of law. *Central Gulf S.S. Corp. v. Int'l Paper Co.*, 477 F.2d 907 (5th Cir. 1973). The present case involves crucial questions of law, which need to be necessarily based upon detailed factual findings. Therefore, in the least, this matter should be remanded to the Federal District Court for a factual and legal exploration of "extraordinary circumstances," irreparable injury, bad faith—if necessary—and due process. There would be no prejudice to any of the parties herein if the hearing in the district court encompassed these issues.

Point V

Policy considerations militate in favor of federal interference in state criminal proceedings in the present case.

As was recognized in *Younger v. Harris*, comity is a concept embodying a respect of the federal government for the "legitimate activities of the state.[87] Comity, however, recognizes the need for the National Government to protect federal rights. It is a recognition that the federal courts are the primary repository for the protection of federal rights.[88] Thus, comity is not "blind deference to 'states' rights,'" but rather a signal to the federal government that its efforts to protect federal rights must always

87. 401 U.S. at 44.
88. *Ex parte Virginia*, 100 U.S. 339, 346 (1880).

be done in ways that will not "unduly interfere" with legitimate state functions.[89]

A state, of course, has a legitimate interest in administering its criminal justice system. Any undue interference with its legitimate administration would offend notions of comity. Our federal courts, however, have never hesitated to step in to vindicate important federal rights if those rights were being violated by state officials. *E.g., Allee v. Mandrano*, — U.S. —, 94 S. Ct. 2191 (1974); *Dombrowski v. Pfister*, 380 U.S. 481 (1965); *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972); *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966).

When a state Supreme Court engages in activities patently violative of due process, then colludes with a Deputy Attorney General to coerce an individual out of the assertion of other constitutional rights, federal intervention is not only indicated, but absolutely mandated. For, in this situation, to whom is the individual to turn to vindicate his constitutional rights within the state? He can no longer turn to the judiciary because it is involved in illegal conduct. He is being besieged by those very authorities to whom he would primarily turn for protection. His only remaining avenue available for the protection of his constitutional rights is the federal courts. Federal court interference would thus not be "unduly interfering" with any "legitimate" state activity. Indeed, for the federal court to abstain in that situation would not only be that "blind deference" even the *Younger* opinion found impermissible, but would be committing the victim to summary punishment at the hands of his executioners.

The situation herein represents an illegitimate exercise of state power. This is not a case where there was a

89. *Younger v. Harris, supra*, 401 U.S. at 44.

good-faith attempt to enforce what might be an invalid statute. Here, there was a conspiracy between separate branches of government directed to the subversion of petitioner's constitutional rights. Surely, tension could arise by federal interference of state officials in a good faith attempt to enforce their criminal law. In the present situation, however, there can be no tension since it can in no way be said that legitimate state processes were being thwarted.

Here, the allegation has been made that the highest court of the State of New Jersey was engaged in an effort to violate the civil and constitutional rights of petitioner. Here it is alleged that there was a wholesale failure by the state judiciary and the executive to abide by notions of due process and other constitutional strictures. More importantly, petitioner's allegations have remained unrefuted; in fact, they have been admitted in an attempt to ameliorate their severity.[90] Under these conditions could the intervention mandated by the court below detract from the integrity of the state process, or rather, would it reestablish respect for proper state functions?

The court below concluded that federal intervention herein would serve to straighten notions of comity and respect.[91] Under the unusual factual complex presented herein could it be said that this conclusion was wrong? As the court below recognized, "judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove."[92] This

90. Respondents have admitted that the New Jersey Supreme Court directed the Administrative Director of the New Jersey Courts to obtain the raw grand jury testimony and exhibits in the Helfant matter, while that matter was still being presented and even prior to the indictment of Helfant.

91. *Helfant v. Kugler, supra,* 500 F.2d at 1196-98.

92. *Id.* at 1197. The court quoted from Lord Herschell's remark to Sir George Jessel, "important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."

thought has been expressed in our cases and has become a concomitant of due process.

> A fair trial in a fair tribunal is a basic requirement of due process. • • • [O]ur system of law has always endeavored to prevent even the probability of unfairness. *In re Murchison*, 349 U.S. 133, 136 (1955).

Moreover, can it be said that a holding in favor of the petitioner would cause a "floodgate" of similar cases in the federal courts? The answer is undoubtedly not. As the court below recognized[93] a precedential value of any holding in petitioner's favor would be limited at best. The operative facts would be limited to the State of New Jersey, where the constitution vests in the Chief Justice of the State's highest court the total and complete administrative control over judges of the trial level and the Appellate Division. Secondly, the present case alleges involvement by the Supreme Court with an attorney, who allegedly was the target of a state grand jury proceeding, who was summoned to appear before the Supreme Court minutes prior to a scheduled grand jury appearance. Lastly, it is alleged that prior to such appearance before the state's highest court, petitioner had resolved to invoke his Fifth Amendment rights before the grand jury. The questioning by the Supreme Court had been calculated to, and so unnerved him, that he was unable to exercise a free will. These are indeed extraordinary facts. Furthermore, a holding in petitioner's favor would only mandate that the facts herein are "extraordinary" in terms of *Younger* considerations. As such, there could be no precedential value to any future case, since each would have to stand on its own merits for such a legal determination.

93. *Id.* at 1198.

To insure against any hint of a recurrence of any similar conduct, a prophylactic remedy must obtain herein. Only through an injunction will the state authorities be put on notice that activities of this kind will never be tolerated and that prosecutions, once tainted, will never be allowed to continue on their repressive paths. For as has been said:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. • • • Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1955).

Furthermore, the prophylactic rule will remove the chilling effect on the Fifth Amendment rights by individuals in situations comparable to petitioner's who may be called to testify before a state grand jury. *Cf., State v. Falco*, 60 N.J. 570, 292 A.2d 23 (1972).

Petitioner deserves full vindication. The burdens placed upon him by the tainted state prosecution and the tainted indictment should be once and for all lifted, so that he may go back and pick up the scattered pieces of his wrecked personal and professional life.

CONCLUSION

The unique facts of this case, the law as found in *Younger v. Harris* and its companion cases, and in those cases that have followed *Younger*, lead inevitably to the conclusion that the present case involves "extraordinary circumstances" and that federal interference in the pending state criminal prosecution is not only mandated but compelled. Thus, this Court should enter an order permanently enjoining petitioner's state criminal prosecution or, in the alternative, remand this matter to the district court for further proceedings.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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ARGUMENT

As one of their principal contentions, respondents have argued that "when a witness has been wrongfully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coerced testimony and its derivative use."[1]

1. Petitioner's Brief, No. 74-80 at 66, citing *Kastigar v. United States*, 406 U.S. 411 (1972); *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 72 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

Subsequent to the filing of Petitioner's brief[2] this Court decided *Maness v. Meyers*, 43 U.S.L.W. 4143 (United States, January 15, 1975). Petitioner submits that this case has great relevance to respondents' important argument that petitioner may be returned to the *status quo ante*. Thus, he submits this supplemental brief to deal with the important and highly relevant considerations raised by *Maness*.

In *Maness v. Meyers*, this Court granted *certiorari* to decide whether in a state civil proceeding a lawyer could be cited for contempt for advising his client, a party to the litigation, that the client could refuse on Fifth Amendment grounds to produce subpoenaed materials.[3] Petitioner, a lawyer, represented a client who had been subpoenaed to produce in a civil proceeding certain allegedly obscene magazines he was selling. It became clear that petitioner would advise his client not to produce the magazines on Fifth Amendment grounds. Opposing counsel argued that if petitioner's client produced the magazines he would be amply protected because in any ensuing criminal action he could move to suppress or object to the introduction of the magazines in evidence on Fifth Amendment grounds.[4] This Court squarely answered this argument in language that has great relevance to the contention of the respondents set out above.

Initially, this Court recognized that all court orders were to be complied with promptly, since prompt compliance led to the orderly and prompt administration of justice.[5] A different situation arose, however, if the court, during trial, ordered a witness to reveal information. Here com-

2. Petitioner has already filed his Reply Brief in No. 74-80.
3. 43 U.S.L.W. at 4144.
4. *Id.* at 4147.
5. *Id.* at 4146.

pliance could cause irreparable injury since the appellate court could not always "unring the bell" once the information was released.[6] Since this was a special situation, this Court recognized an alternative avenue available to the person in this situation: under *United States v. Ryan*, 402 U.S. 530, 532-33 (1970), he could comply, or refuse and expose himself to an adjudication of contempt.[7] This Court found that this method of achieving pre-compliance review was particularly appropriate when the Fifth Amendment privilege against self-incrimination was involved. Since the privilege had always been broadly construed to ensure that an individual was not compelled to produce evidence which later could be used against him in a criminal action, *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), and in view of the fact that it was "respect for the individual" which was the bedrock of the privilege, this Court found that the procedure in *Ryan* was an eminently reasonable method to challenge the order to produce.[8] Thus, in this preliminary exposition, this Court re-affirmed that stature to be afforded the Fifth Amendment privilege. This Court stressed a procedure that would prevent pre-review disclosure of information.

This Court then dealt with the contention of opposing counsel below "that if petitioner's client produced the magazines he was amply protected because in any ensuing criminal action he could always move to suppress, or object on Fifth Amendment grounds to the introduction of the magazines into evidence."[9]

First, this Court intimated that waiver problems could certainly arise if the magazines were produced.[10]

6. *Id.* at 4147.
7. *Ibid.*, citing *United States v. Ryan*, 402 U.S. 530, 532-33 (1971).
8. *Ibid.*
9. *Ibid.* footnote number omitted.
10. *Ibid.*, citing *Rogers v. United States*, 340 U.S. 367 (1951).

Secondly, and more importantly, it found that such a procedure "would not afford adequate protection."[11] As this Court recognized, without something more (a grant of immunity), the witness "would be compelled to surrender the very protection which the privilege [was] designed to guarantee."[12] The witness would be letting the "cat out of the bag" with no assurance that a later objection or motion to suppress would put it back.[13] Thirdly, this Court distinguished *United States v. Blue*, 384 U.S. 251, 255 (1966), on the crucial ground that Blue had voluntarily turned over the requested information to the government without asserting his Fifth Amendment privilege. In other words, Blue had waived his rights.

Thus, by expressly disavowing the procedure stressed by opposing counsel in the lower court, this Court has expressly rejected respondents' position that even if petitioner was wrongfully deprived of his privilege against self-incrimination, he could be returned to the *status quo ante* merely by suppression of the coerced testimony and its derivative use.[14] In the area of the Fifth Amendment privilege, the harm is done when the information is divulged. It is irreparable since, as this Court recognized, the appellate court could not always "unring the bell" once the information had been released.[15] Once the information is divulged it could be used in many ways that could not be affected by any later order suppressing use of the information itself.

In this sense, the irreparable injury caused Helfant is illuminated. When he was coerced by the New Jersey

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11. *Ibid.*
12. *Ibid.*, quoting from *Hoffman v. United States*, 341 U.S. 479, 486 (1951).
13. *Id.* at 4148.
14. See note 1, *supra*.
15. 41 U.S.L.W. at 4147.

Supreme Court to waive his Fifth Amendment privilege the "cat was out of the bag." The very right he was seeking to assert was violated and nothing could undo this damage. Unlike the defendant in *United States v. Blue*,[16] Helfant did not voluntarily waive his rights and thus this case can be of no help to respondents.[17]

Furthermore, this analysis vitiates respondents' contention that the false swearing counts of the state indictment can be analytically distinguished from the substantive counts.[18] It must be remembered that the opinion of the Court of Appeals for the Third Circuit did not distinguish between these counts,[19] and that Court refused to reconsider its position on this point. Respondents expressed surprise at this position.[20] The simple answer, of course, is that the Court of Appeals recognized what was implicit in *Maness v. Meyers:* for Fifth Amendment purposes, considering the values the Amendment seeks to protect, there can be no distinguishing between the counts. Once the information is released, the constitutional harm has occurred.[21]

Moreover, the Court of Appeals recognized that the petitioner was suffering irreparable injury on all counts since the lack of an adequate state forum applied to the entire indictment. It was the entire state judicial system that was subject to the tremendous power of the Chief

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16. 384 U.S. 251 (1966).
17. See Petitioner's Brief, No. 74-80 at 64.
18. *Id.* at 55-72.
19. *Helfant v. Kugler*, 500 F.2d 1188 (3d Cir. 1974).
20. Petitioner's Brief, No. 74-80 at 55.
21. Four counts of the seven count indictment were for false swearing. An examination of the State indictment shows that the false swearing counts were inextricably intertwined with the substantive counts; actually they were the substantive counts with the additional allegation that Helfant did not tell the truth about certain of the substantive allegations when he testified after being coerced by the New Jersey Supreme Court. In essence, Helfant was accused of not agreeing with the allegations of three convicted felons.

Justice[22] and all appeals covering any part of the indictment would eventually come before the very court alleged to have engaged in the coercion. This is the reality of this case; this is the legal position confronting the petitioner.

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22. In this regard, a recent amendment to the Rules Governing the Courts of the State of New Jersey, effective April 1, 1975, is very instructive: "The Chief Justice of the Supreme Court shall be responsible for the administration of all courts in the State. He shall appoint an Administrative Director of the Courts to serve *at his pleasure*. • • • The Chief Justice shall designate a judge of the Supreme Court as Assignment Judge for each county, to serve *at his pleasure*, and a judge of each multiple-judge county district court and juvenile and domestic relations court as presiding judge of such court, to serve *at his pleasure*. • • •" *R. 1:33-1* (emphasis added).

CONCLUSION

Maness v. Meyers demonstrates the falacy of respondents' position and illuminates the irreparable constitutional harm petitioner has suffered and continues to suffer. It demonstrates once again that this Court should enter an order permanently enjoining petitioner's state criminal prosecution or, in the alternative, remand this matter to the District Court for further proceedings.

Respectfully submitted,

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